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OF THE
LAWS OF ENGLAND
VOLUME V

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ENCYCLOPÆDIA
OF THE
LAWS. OF ENGLAND

BEING A
NEW ABRIDGMENT
BY THE
MOST EMINENT LEGAL AUTHORITIES

UNDER THE GENERAL EDITORSHIP OF
A. WOOD RENTON, M.A., LLB.
OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME V
EMPLOYERS' LIABILITY TO FREEMASON

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ERRATA.

In vol. iv. p. vii., in the reference to the article on *Cross Appeals*, for "FRANCIS A. SPRINGER, of the Central Office," read "C. BURNEY, one of the Masters of the Supreme Court of Judicature."

Also, in the reference to the article on *Customs*, for "C. J. FOLLETT," read "C. J. FOLLETT, C.B."

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ENCYCLOPÆDIA

OF

THE LAWS OF ENGLAND

Employers' Liability.

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The "law of employers' liability" has by usage become the term employed to express the liability imposed by the law of England upon employers of labour to make pecuniary compensation to their workmen in respect of personal injury suffered in the course of their employment. This liability has a three-fold origin, and may conveniently be treated of by considering separately each of the three sources from which it arises as follows:—

1. An employer's liability at common law.
2. An employer's liability under the Employers' Liability Act, 1880.
3. An employer's liability under the Workmen's Compensation Act, 1897.¹

1. AN EMPLOYER'S LIABILITY AT COMMON LAW.

A general principle of the common law imposes upon every person the obligation of regulating and governing his own actions and business in such a manner as not to cause injury to others (*Sic utere tuo ut alium non lædas*). Anyone guilty of a breach of this duty becomes liable for the consequences resulting from such breach. An employer being no exception

¹ This Act comes into operation on the 1st of July 1898.

to the rule, it follows that for his personal negligence occasioning injury to his workmen, he always has been, and is still responsible.

Further, it is a logical consequence of the duty that, when, for his own purposes, he brings into existence commercial undertakings which, if not superintended and controlled with due care and caution, involve risks of personal injury to his workman engaged therein, the obligation rests upon him to exercise such care and caution.

Liability for Negligent System.—It follows that an employer is responsible at common law, as well to his workmen as to other persons, for injury caused by the negligent system on which his business, if controlled and managed by himself, is carried on.

Such negligence may consist either in a defective system of management, or in the use by an employer of defective agencies for the carrying on of his undertaking. Thus a failure on his part to provide machinery or workmen reasonably capable of doing the required work in a safe manner, is a breach of this common law duty, for which, if resulting in injury, he has always been responsible (*Brown v. Accrington*, 1865, 3 H. & C. 511). The common law liability of the employer in this connection cannot be better stated than in the words of Lord Herschell in his judgment in the case of *Smith v. Baker* ([1891] App. Cas. 325):—

It is quite clear that the contract between employer and employed involves, on the part of the former, the duty of taking reasonable care to provide appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

(See also *Brydon v. Stewart*, 1855, 2 Macq. H. L. Cas. 30.)

Employers' Duty Personal only.—It must be always borne in mind, for herein lies the power to properly understand the protracted dissatisfaction upon the subject of employers' liability, and the legislation resulting therefrom, that this common law duty resting upon the employer was a personal duty only, and passed from him when he delegated his duties as employer to other hands. The responsibility flowing from his duty at common law was strictly interpreted and severely restricted by the Courts of law, and the curtailing effect of some other principles of the common law, vigorously applied, soon rendered it, as far as regarded the workmen, little more than a liability in name.

Limitation of Common Law Liability.—The common law doctrine that all personal actions died with the persons entitled to bring them, or against whom they were brought (*actio personalis moritur cum persona*), relieved the employer from the consequences of injuries resulting in death, and protected his estate from liability in cases where he died before judgment was recovered against him.

Although this is altered as regards injury resulting in the workman's death by the general operation of Lord Campbell's Act (9 & 10 Vict. c. 93), and to a limited extent by the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), in case of the employer's death, the common law principle still remains, and in some cases may apply.

By far the greatest blow to the practical utility of the employer's common law liability was dealt by a decision of the Court of Exchequer in the year 1837, in the well-known case of *Priestley v. Fowler* (1838, 3 Mee. & W. 1). This case decided that another important and well-known principle of law, of universal application to all other relationships, should have no application to the relationship between employer and workmen. We refer to the principle expressed by the maxim, "*Qui facit per alium*

facit per se," the application of which would have rendered an employer responsible to a workman for the negligence of his agents and other workmen engaged in the execution of his work for his profit.

• *Common Employment*.—Thus came into existence the "doctrine of common employment." It may be expounded as follows:—If the person occasioning, and the person suffering, the personal injury, are fellow-workmen engaged in a common employment, and under a common master, such master is not responsible for the results of the injury.

The case of *Priestley v. Fowler*, *supra*, having been followed in many other cases (see *Hutchinson v. The York, Newcastle, & Berwick Ryw. Co.*, 1850, 5 Ex. Rep. 343; 19 L. J. Ex. 266; *Wigmore v. Jay*, 1850, 5 Ex. Rep. 354; *Lovell v. Howell*, 1876, 1 C. P. D. 161; 45 L. J. C. P. 387), was finally, in the year 1860, declared to be the law of England and Scotland alike by the House of Lords in the case of *The Bartonshill Coal Co. v. Reid* (3 Macq. H. L. 266). Various decisions carried this doctrine to an extent, logical perhaps, but in practice inconvenient and somewhat hard. As illustrations—a chief engineer was held to be in a common employment with one of the ordinary seamen employed by the same company (*Searle v. Lindsay*, 1862, 11 C. B. N. S. 429; 31 L. J. C. P. 106); a railway guard with a ganger of platelayers in the service of the same company (*Waller v. South-Eastern Ryw. Co.*, 1863, 2 H. & C. 102; 32 L. J. Ex. 205); a builder's labourer with his foreman (*Wigmore v. Jay*, 1850, 5 Ex. Rep. 354; 19 L. J. Ex. 300); and the master of a ship with one of the sailors employed by the same company (*Hedley v. Pinkney Shipping Co.*, [1894] App. Cas. 222; 61 L. J. Q. B. 79).

A yet further inroad upon the small residuum of the employer's common law responsibility was made by decisions of the Courts establishing that the workman might agree with the employer to take upon himself the risk of any consequences which might result to him through the non-fulfilment by the employer of his duty, and further holding that such an agreement need not be in express terms, but could be implied from the conduct of the parties (see *Dynen v. Leach*, 1857, 26 L. J. Ex. 261; *Laston v. Hawksworth*, 1872, 26 L. T. 851).

Volenti non fit injuria.—The principle of these decisions is often enunciated in what has been called the somewhat barbarous legal maxim, "*Volenti non fit injuria*." It was within the last few years most exhaustively discussed and considered by Bowen, L.J., in the well-known case of *Thomas v. Quartermaine* (1887, 18 Q. B. D. 685; 57 L. T. 537). In his judgment therein he lays stress on the fact that the maxim is not *scienti non fit injuria*, but *volenti non fit injuria*, and declares that before it can apply the workman must both know of, and appreciate, the risk and danger, and then voluntarily agree to take the risk (see also *Yarmouth v. France*, 1888, 19 Q. B. D. 647; 57 L. J. Q. B. 7; *Church v. Appleby*, 1889, 58 L. J. Q. B. 144; 60 L. T. 542).

In the year 1891, in the important case of *Smith v. Baker* ([1891] App. Cas. 3; 60 L. J. Q. B. 683) the House of Lords gave most careful consideration to this question. The judgments of the majority of the Lords, although not declaring the doctrine to be bad law, or indeed finding fault with the declaration of it by Bowen, L.J., in *Thomas v. Quartermaine*, must be taken to have greatly contracted the scope of its application. The discussion turned chiefly upon the inference to be drawn from the fact of a workman's continuance in the employment, with knowledge that he thereby incurred the risk of personal injury.

As the result of the case it must now be accepted as law that, although a workman may, having full knowledge and appreciation of the risk he

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runs, nevertheless agree with his employer to run this risk, yet it is no part of the implied contract of service that the workman takes the risk of injury arising from his employer's negligence, neither can such a contract be implied from the workman's continuance in the employment with knowledge of the risk.

The question may still be regarded as open whether, in a case where the alternative of entering upon or of leaving the employment or of working subject to a known risk is in plain terms offered to the workman, his election to work would *per se* bring him within the application of the doctrine.

Contributory Negligence.—Lastly, the employer was always relieved from the consequences of his breach of duty, by showing that the injured workman had himself been guilty of negligence in part conducing to the result for which he was attempting to hold the employer responsible; in other words, by showing that the workman had been guilty of contributory negligence.

We may sum up the employer's common law liability, as at present existing, thus: He is responsible to his workmen for the consequences of personal injury caused by his personal negligence if judgment can be obtained against him during his lifetime, but not responsible to the relatives or representatives of a deceased workman. He is absolved from responsibility for the negligence of those to whom he delegates the duty of management and control of his business, and for the negligence of fellow-workmen of the workman injured. He can be freed from responsibility by showing that the injured workman took the risk of his breach of duty, or by showing that the injured workman was himself guilty of contributory negligence.

Lord Campbell's Act.—The first important statute extending this liability was an Act of general application passed in the year 1846, and known as Lord Campbell's Act (9 & 10 Vict. c. 93). This Act, for a full treatment of which the reader is referred to the articles *ACTIO PERSONALIS MORITUR CUM PERSONA*, and *CAMPBELL'S (LORD) ACT (ACCIDENTS)*, enabled the personal representatives of a workman, as of any other person whose death was caused by the wrongful act, neglect, or default of another, to bring an action against the person guilty of such wrongful act, neglect, or default, to recover damages for the benefit of the relatives of the deceased therein named (ss. 2-5; and see Amendment Act, 27 & 28 Vict. c. 95).

To this extent, and from this time, the application of the doctrine *actio personalis moritur cum persona* has been restricted.

In consequence of the increase in magnitude of private business undertakings where the employer took but a small part in the actual management, and the establishment of companies with limited liability, where the employer was but an abstract personality, it was felt that the application to such undertakings of the doctrine of common employment in its entirety was productive of hardship.

This feeling was one of the chief causes of the passing of the Employers' Liability Act of 1880, which came into operation on the 1st of January 1881.

2. THE LIABILITY OF AN EMPLOYER UNDER THE EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 Vict. c. 42).

The general scope and object of this Act is to so far expand the employer's responsibility as to make him liable for the negligent acts or default of those to whom he has delegated his duties of control and

management, and of those whom he has placed in positions of authority over his workmen.

Subject to this inroad, the doctrine of common employment is allowed to remain as a defence to the employer, with the exception that in the case of railway servants, owing probably to the hazardous nature of their employment, its application is, as we shall see, further restricted.

By the various provisions of the Act the employer is made responsible where personal injury is caused to the workman from any of the following causes:—

(a) *Any defect in the condition of the ways, works, machinery, or plant connected with or used in his business, but only if such defect arose, or had not been discovered or remedied, owing to his negligence* (this, as before seen, is no new liability), *or to that of the person to whom he has entrusted the duty of seeing that they are in proper condition* (s. 1, subs. 1 read with s. 2, subs. 1).

Cases upon this Section.—The defect in the “ways” must be in their permanent or quasi-permanent condition. A temporary obstruction negligently placed or thrown thereon does not make the condition of the way itself defective (*McGiffin v. Palmer's Shipbuilding Co.*, 1883, 10 Q. B. D. 5; 52 L. J. Q. B. 25; 47 L. T. 346, followed in *Peyram v. Dixon*, 1886, 55 L. J. Q. B. 447; 58 L. T. 762; see also *Wood v. Dorrall*, 1886, 2 T. L. R. 550; *Bromley v. Cavendish Spinning Co.*, 1886, 2 T. L. R. 881). The “way” need not be a defined path. The whole of a yard or workshop over which the workmen pass, may be a “way” within the meaning of the Act (*Willett v. Watts*, 1893, 8 T. L. R. 533). The “works” need not be the employer's, in the sense that he is owner of the same. Land or premises upon which he takes his workmen, and over the condition of which he has for the time being control, may be considered his for the purposes of the Act (*Brannigan v. Robinson*, 1892, 61 L. J. Q. B. 202). Works in course of erection, intended upon completion to be used in the employer's business, become his works only when so entered upon (*Howe v. Mark Finch*, 1886, 17 Q. B. D. 187).

The word “plant” has received a very wide interpretation, and has been held to include both animate and inanimate chattels. A vicious horse used in the employer's business has been held to be defective plant (*Yarmouth v. France*, 1888, 19 Q. B. D. 647; 57 L. J. Q. B. 7). The definition of the word “plant” given in this case by Lindley, L.J., included “whatever apparatus is used by a business man for carrying on his business, not his stock-in-trade which he buys or makes for sale, but all goods and chattels fixed and moveable, live or dead, which he keeps for permanent employment in his business.”

The defect in the plant, machinery, etc., may exist either in the condition of the plant itself, or in its unfitness or unsuitability for the purpose for which it is used (*Cripps v. Judge*, 1887, 13 Q. B. D. 583; 53 L. J. Q. B. 517; 51 L. T. 181, following *Heske v. Samuelson*, 1883, 12 Q. B. D. 30; 53 L. J. Q. B. 45; 49 L. T. 474). This unfitness or unsuitability must be with reference to the purpose for which it was supplied or used by the employer. An unauthorised application of the plant, etc., to purposes for which it was not supplied or intended does not make the employer liable for defective plant (*Jones v. Burford*, 1883, 1 T. L. R. 137). The plant, like the ways or works, need not belong to the employer. It is sufficient that it is used in his business (*Bacon v. Gray, Dawes, & Co.*, 1887, 3 T. L. R. 557).

Machinery is not defective merely because it is dangerous, but if the danger is such that it cannot be used by the workmen, even though they take all reasonable care, without great risk of personal injury, it may be

held to be defective within the meaning of the Act (*Walsh v. Whiteley*, 1888, 21 Q. B. D. 371; 57 L. J. Q. B. 586). Unfenced machinery may be defective plant (*Iles v. Abercarn Flannel Co.*, 1887, 2 T. L. R. 547).

The defect, either in the ways, works, machinery, or plant, must be one implying negligence on the part of the employer or his deputy. The action must be founded upon negligence, and can succeed only where this is proved (*Moore v. Ginson*, 1889, 58 L. J. Q. B. 169; *Kiddle v. Lovatt*, 1886, 16 Q. B. D. 605; 34 W. R. 578).

(b) *The negligence of his workman to whom he has entrusted powers of superintendence or control.*—The workmen for whose negligence by sec. 1, subsecs. 2 and 3, the employer is made liable, are (i.) those whose sole or principal duties are those of superintendence and who are not ordinarily engaged in manual labour (s. 8); (ii.) those to whose orders or directions the workmen are bound to conform where injury results from their so conforming.

The superintendent under subsec. 2 must not only be guilty of negligence, but the negligence must be whilst in the exercise of his superintendence (*Shaffers v. General Steam Navigation Co.*, 1883, 10 Q. B. D. 356; 52 L. J. Q. B. 260; 48 L. T. 228; *Osborne v. Jackson*, 1883, 11 Q. B. D. 619; 48 L. T. 643).

The words "any superintendence" having regard to the latter words of the subsec. and to the provision in sec. 8, requiring that the principal duties shall be those of superintendence, are somewhat misleading.

The workman entrusted with the power of giving orders or directions, for whose negligence the employer is liable under subsec. 3, may be himself engaged in manual labour. The orders given by him need not be express orders, but may be implied from the course of the business (*Milward v. Midland Ry. Co.*, 1885, 14 Q. B. D. 68; 54 L. J. Q. B. 202; 52 L. T. 453); but they must be orders or directions implying some authority in the person giving them, and not mere directions from one workman to another necessitated by or adopted for the convenience of the carrying on of the work on which they are both engaged (*Howard v. Bennett*, 1889, 58 L. J. Q. B. 129; 60 L. T. 152; *Snowden v. Baynes*, 1890, 24 Q. B. D. 568; 59 L. J. Q. B. 325).

It has been decided by the Court of Appeal (*sed quære*) that the employer is fixed with liability under this subsec. (3) if the workman is injured owing to the negligence of the person giving the order or direction, although such order or direction was not negligent in itself, but a right and proper one, if but for conforming to it the workman would not have suffered the injury.

In other words, the order or direction need not be the *causa causans* if it is the *causa sine qua non* of the injury (*Wild v. Waygood*, [1892] 1 Q. B. 782; 61 L. J. Q. B. 391).

(c) *The act or omission of any person in his service done, or made in obedience to his rules or by-laws, or in obedience to particular instructions given by any person delegated by him with authority on that behalf* (s. 1, subs. 4).

This subsection imposes a liability for acts or omissions done or made—

(i.) In pursuance of rules or by-laws, but only when such rules or by-laws are improper (s. 2, subs. 2). In a case where they are sanctioned by Parliament or by a Government Department, they are not, for the purposes of the Act to be deemed improper (s. 2, subs. 2);

(ii.) In obedience to particular instructions given by any person delegated with the authority of the employer in that behalf: but, again, only

where such particular instructions are improper, *i.e.* negligent (s. 2, subs. 2).

This last clause is vague, and it is difficult to say to what state of circumstances it could apply. Whether the particular instructions are to emanate from the employer himself, in which case the enactment would appear to be unnecessary, or whether the employer is to specially authorise some person to give the particular instructions to the workman is doubtful. No cases have been decided upon these words, and we are not aware of any action having been founded upon them.

(d) *The negligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine, or train upon a railway.*

This is the special beneficial clause for railway servants before mentioned. No definition is given in the Act of the words "train" or "railway." It has been decided that they must be construed in their popular sense. "Railway" has been held to include a temporary line of rails used by a railway contractor (*Doughty v. Firbank*, 1883, 10 Q. B. D. 358; 52 L. J. Q. B. 480; 48 L. T. 530); and "train," a number of connected railway trucks without an engine, and worked from a capstan at a distance by a fixed hydraulic engine (*Cox v. G. W. Rwy. Co.*, 1882, 9 Q. B. D. 106). On the other hand, it has been held that a steam crane which could be propelled along a fixed set of rails is not a locomotive engine within the meaning of the Act (*Murphy v. Wilson*, 1883, 52 L. J. Q. B. 524; 48 L. T. 788).

The negligence not only must be on the part of the person who has the charge or control, but must be his negligence in the performance of such duty of charge or control. This was held by the Court of Queen's Bench in the case of *Gibbs v. G. W. Rwy. Co.* (1883, 11 Q. B. D. 22; 53 L. J. Q. B. 543), and approved by the Court of Appeal. It appears to conflict with the principle laid down in the case of *Wild v. Waggood*, *ante*, which, as before stated, we think was wrongly decided.

The various heads we have considered sum up the liability imposed upon an employer by the Employers' Liability Act, 1880. The workman, or his representative, in enforcing this liability is placed in the same position as if he had not been a workman of the employer, *i.e.* in the same position as a stranger. He is liable to have set up in answer to his claim any or all of the defences which could be set up against a stranger enforcing liability at common law; and, in addition, the Act gives to the employer two further defences to any action brought by his workman.

First, the workman cannot recover if the employer can prove that he knew of the defect or negligence which caused his injury, and failed within reasonable time to give or cause to be given information thereof to the employer or to some person superior to himself in the service of the employer, unless he was aware that the employer or such superior knew of the said defect or negligence (s. 2, subs. 3). Under this subsection the act of culpability, which is to disqualify the injured workman from recovering damages, is the failure to inform of defects or negligence in a case where he is unaware whether or not the employer or his own superior in the service knows of the same. The intention of the Legislature appears to have been to impose upon every workman, for the purposes of their mutual protection, the duty to inform of existing defects or negligence. That the employer or superior was in fact aware of the defect or negligence does not excuse the workman who is ignorant of their state of mind upon the subject. We know of no reported decision upon this point, although it has arisen and been discussed in several cases.

Secondly, the employer can set up the defence that he has received no notice of injury as required by sec. 4 of the Act, or that the action has not been commenced against him within the time prescribed by the same section, viz. six months from the date of the injury, or, in case of death, twelve months from the time of death.

These defences are special defences, of which notice must be given five clear days before the return day of the summons (*Conroy v. Peacock*, [1897] 2 Q. B. 6; 66 L. J. Q. B. 425).

The notice must be given within six weeks from the time of injury sustained (s. 4). It must be in writing (*Moyle v. Jenkins*, 1881, 8 Q. B. D. 116; 51 L. J. Q. B. 112), and should contain the name and address of the injured workman, and, in ordinary language, the cause of the injury and the date on which it was sustained (s. 7). It may be served by delivery to the employer at his residence or place of business, or by registered letter addressed to him at his last known place of residence or place of business. If sent by registered letter, proof of its posting, properly addressed, is good notice under the Act, although the letter miscarries (s. 7) (*Prevesi v. Gatti*, 1888, 4 T. L. R. 487). The same section declares that the notice is not to be deemed invalid by any defect or inaccuracy therein, unless the judge shall think that the defendant is prejudiced thereby, and that the defect or inaccuracy was for the purpose of misleading. Soon after the coming into force of the Act, it was held that although defects or inaccuracies might be excused, yet if the notice did not in substance give the information required by sec. 7, it could not be regarded as a notice under the Act at all (*Keen v. Millwall Dock Co.*, 1881, 8 Q. B. D. 482; 51 L. J. Q. B. 277; 46 L. T. 472). This severe construction has not been followed; but at the present time a notice is held good, though wanting in one or more of the requirements of the section, if the judge thinks such defects are the result of accident, and that the employer is not prejudiced thereby (*Stone v. Hyde*, 1881, 9 Q. B. D. 76; 51 L. J. Q. B. 452; 46 L. T. 421; *Carter v. Drysdale*, 1884, 12 Q. B. D. 91; 53 L. J. Q. B. 557; 32 W. R. 171; *Hearn v. Phillips*, 1884, 1 T. L. R. 475; *Prevesi v. Gatti*, *supra*).

Although notice should be given by registered letter, the posting of a non-registered letter, properly addressed, is *prima facie* proof of service, i.e. the onus is thrown upon the defendant of showing it did not reach him (*Prevesi v. Gatti*, *supra*).

In case of death resulting from the injury, the judge has power to excuse the want of notice if, in his opinion, there was reasonable excuse for the same not having been given.

The six or twelve months within which the action must be commenced are calendar months (Interpretation Act, 1889, 62 & 63 Vict. c. 63, s. 3).

Damages.—The damages recoverable under the Act, either by the injured workman or by his representatives, cannot exceed three years' wages. These are calculated, not necessarily upon those received by the workman himself, but upon the average wages in the trade and in the district during the three years preceding the injury (s. 3).

Overtime, though earned in another employment, may be taken into account, so long as the maximum sum allowed by the Act is not exceeded (*Bortick v. Head, Wrightson, & Co.*, 1886, 35 L. T. 909; 3 T. L. R. 103).

Any penalties recovered from the employer in respect of the injury under any other Act of Parliament must be deducted, and cannot be sued for if compensation is once awarded under this Act (s. 5). (See for such a penalty sec. 82 of the Factory Act, 1878, 41 Vict. c. 16, and sec. 13 of the Factory Act, 1895, 58 & 59 Vict. c. 37.)

Every action under the Employers' Liability Act must be brought in England in the County Court. It may be removed into the High Court in the same way as any other County Court action is removed (s. 6). This is done by writ of *certiorari* (*q.v.*) obtained upon affidavit from a judge or master of the High Court. The usual ground of removal is that difficult questions of law are likely to arise at the trial which cannot be satisfactorily dealt with in the County Court; but the magnitude and importance of the action, particularly if it be a test case, is often taken into account.

Great difficulty is in practice experienced in removing these cases into the High Court. The judges and masters have held that the jurisdiction given exclusively to the County Courts must, save in very exceptional cases, remain there (*Munday v. Thames Ironworks Co.*, 1883, 11 Q. B. D. 59; 52 L. J. Q. B. 119; 47 L. T. 351 *contra*; *Larbey v. Greenwood* (unreported)). The defendant cannot get his action removed into the High Court by objecting to the jurisdiction of the Court under sec. 62 of the County Courts Act, 1888, even though willing to give the security required by that section (*R. v. Judge of the City of London Court*, 1885, 14 Q. B. D. 905; 54 L. J. Q. B. 330; 52 L. T. 537).

Assessors may be appointed to sit with the County Court judge for the purpose of ascertaining the proper amount of compensation to be awarded (s. 6, subs. 2). (We have never known this done.)

The action in the County Court is regulated generally by the procedure obtaining in the Court, but several special rules have been framed and applied thereto. These rules relate to the particulars of demand to be filed by the plaintiff with the summons, the length of time which must elapse between the taking out of the summons and the return day, and the time before the return day for demanding a jury (Order 44, County Court Rules, 1889).

An employer, within the definition of the Act, may be either a particular person or a body of persons corporate or unincorporate (s. 8).

A workman is defined as a railway servant, or any person to whom the Employers' and Workmen Act, 1875, applies (s. 8). By sec. 10 of the latter Act, "workman" does not include domestic or menial servant, but does include "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under twenty-one years of age or not, has entered into or works under a contract with an employer, whether express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labour." The manual labour referred to under the words "otherwise engaged in manual labour," must be *ejusdem generis* with the manual labour exercised by the workmen included by name in the definition. Acting upon this interpretation, such persons as omnibus or tram drivers and shop assistants have been held to be outside the definition in the Act (see *Morgan v. London General Omnibus Co.*, 1884, 13 Q. B. D. 832; 53 L. J. Q. B. 352; 51 L. T. 213; *Cook v. North Metropolitan Tramway Co.*, 1887, 18 Q. B. D. 683; 56 L. J. Q. B. 309; 56 L. T. 448; *Bond v. Lawrence*, 1891, 60 L. J. M. C. 137; see *contra*, *Yarmouth v. France*, 1888, 19 Q. B. D. 647; 57 L. J. Q. B. 7; *Leech v. Gartside*, 1884, 1 T. L. R. 391). Seamen are in terms excluded from the definition of the word "workmen" in the Employers' and Workmen Act, 1875, and are not brought within it, except for the purpose of that Act alone by the subsequent Act (43 & 44 Vict. c. 16, s. 11). Seamen are consequently deprived of the benefits of the Employers' Liability Act.

A workman may contract with his employer that the Act shall not

apply to the contract of service between them. Such contract, when made, will deprive both the workman himself and his representatives of any right to sue (*Griffiths v. Earl of Dudley*, 1882, 9 Q. B. D. 357; 51 L. J. Q. B. 543).

3. AN EMPLOYER'S LIABILITY UNDER THE WORKMEN'S COMPENSATION ACT, 1897 (60 & 61 Vict. c. 37).

This Act, which is supplemental to, and not substituted for the Employers' Liability Act, 1880, comes into force on the 1st of July, 1898.

The principle upon which it is based is entirely new. It introduces a liability not founded upon any breach of duty, either at common law or statutory. The employer is to be henceforth an insurer against accidents which occur in the course of the execution of his work, and is to pay a limited compensation in respect of accidents, whether due to want of care on his part or on the part of his servants or not. The measure being a tentative one, is applied to part only of the industries of the country.

New Liability under the Act.—From and after the coming into operation of the Act, every employer, in the trades specified, is rendered liable to pay to, or in respect of, his workman who suffers injury arising out of, and in the course of his employment, pecuniary compensation upon the following scale:—

(a) If the injury results in death, and the workman leaves dependants (*i.e.* persons who would be entitled to sue under Lord Campbell's Act, 9 & 10 Vict. c. 93) wholly dependent upon his earnings at the time of death, a sum of three years' wages, calculated upon the earnings of such workman for the years next preceding the injury.

(b) If the injury results in death, and the workman leaves dependants in part dependent upon his earnings at the time of death, such sum, reasonable and proportionate to the injury, not exceeding three years' wages, as may be agreed upon, or, in default of agreement, settled by arbitration.

(c) Where the injury results in death, and the workman leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds.

(d) Where total or partial incapacity results from the injury, a weekly payment during incapacity, after the second week, not exceeding fifty per cent. of such workman's average weekly wages, and not exceeding in any case one pound weekly (Sched. 1). In fixing this amount, regard is to be paid to the workman's power of earning wages after the accident, as compared with his power before; also, to any payments already made to him by the employer in respect of the injury (Sched. 1, subs. 2).

The right of the workmen included in this Act, if they prefer it, to sue under the Employers' Liability Act, 1880, or at common law, is preserved in a somewhat clumsy manner by sec. 1, subsec. 2. An employer is not to be liable to pay compensation both under this Act and independently of it. The same section further declares that the employer shall not be liable to proceedings independently of this Act, except in case of "his personal negligence or wilful act," or the "personal negligence or wilful act" of some person for whose act or default he is responsible.

This latter enactment appears to us unnecessary, for we know of no circumstances under which an employer could be held responsible to an injured workman, where the injury had resulted neither from his own wilful act, neglect, or default, nor from that of some person for whose negligence he is legally responsible.

A workman engaged in any of the trades mentioned has now his choice of remedies. He can sue under the Employers' Liability Act, or at common law, in which case he must prove negligence, but if he is satisfied with the compensation awarded by this Act, it is only necessary for him to show that the injury arose out of, and in the course of his employment.

It will never be worth while for the representatives of workmen killed by accident to bring an action, the damages to which they are entitled under this Act being equal to the maximum allowed to be given under the Employers' Liability Act, 1880.

Case in which Compensation to be Disallowed.—In one case only is the compensation given by the Act to be disallowed. This case is where the injury is attributable to the workman's own serious and wilful misconduct (s. 1 (2) (c)).

Some difficulty will probably arise upon the wording of this clause.

- It must be observed that the workman is not to be disentitled on the ground of contributory negligence, but only if the injury was occasioned by his own serious and wilful misconduct. This amounts to declaring that the misconduct must in every case be wilful. What can be said to be a wilful act of misconduct? Such acts will probably not be restricted to, although they will certainly include, acts intended to bring about the injury which resulted. If a workman knowing that the act which he is committing is a serious breach of his duty to his employer, yet wilfully and knowingly perseveres in the same, he will not be able to claim compensation if his injury results from such wrongful act.

Scope of Act.—Only those classes of workmen named in the Act are entitled to claim compensation under it.

The following are the persons included:—railway servants,—workmen in factories, mines, quarries, or engineering works,—workmen employed in or about any building which exceeds thirty feet in height, which is being constructed or repaired by scaffolding, or which is being demolished, or on which machinery driven by steam, water, or other mechanical power is used for its construction, repair, or demolition,—and workmen in the employ of the Crown, except such as are in the naval or military service (s. 7).

Definitions.—The definitions of the words "railway," "factory," "mine," "quarry," and "engineering work," are given in sec. 7, subsec. 2.

- The definition of "workman" is a wide one, and embraces every person engaged in an employment to which the Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service, apprenticeship or otherwise, or expressed or implied, oral or in writing (s. 7, subs. 2).

Under this definition, managers, clerks, and other persons occupying positions of importance in an employment, and not generally designated workmen, will be included.

From the application of the Act to a limited number of trades only results this curious anomaly, that a part of the workmen of the country are, in consequence of having entered into a contract of service with an employer, placed in a more advantageous position than other persons, in that they can obtain compensation for injury without proving negligence, whilst owing to a like contract of service, the disadvantage results to the other part, that they are subject to the doctrine of common employment.

Arbitration.—All questions as to liability to pay compensation under this Act, and the amount and duration of the compensation, including any question as to whether or not the employment is one to which this Act

applies, are to be settled by arbitration (s. 1, subs. 3). No action at law can be brought to decide them, or any of them.

The form of, and procedure in, arbitrations under the Act are fully set out in the second schedule.

If any committee, representative of employer and workmen, exists, with power to settle matters under the Act, the dispute shall, unless either party objects in writing before such committee meets, be settled by the arbitration of such committee, or be, by such committee, referred to the special arbitration instituted under this Act (s. 1).

If no such committee exists, or if it cannot act, or itself refers the dispute to arbitration, or fails to settle the matter within three months, the dispute is to be referred to a single arbitrator to be agreed upon between the parties; or, in default of agreement, to the County Court judge of the district in which the parties reside; or in England, if the Lord Chancellor so authorises, it may be referred to a single arbitrator appointed by such County Court judge (clauses 2-9).

Note.—If the parties should reside in different districts, the reference is to the County Court judge of the district in which the injury occurred.

The lay arbitrator is to have all the powers of a County Court judge (3), but the Arbitration Act, 1889, is not to apply to arbitrations under this Act (4).

There is an appeal from the lay arbitrator on questions of law only, to the County Court judge, and from the County Court judge to the Court of Appeal; the award when made, either by the County Court judge or by the lay arbitrator, is to be recorded in the County Court of the district in which any party entitled thereby to receive compensation resides, without fee, and to be enforceable in the same manner as a County Court judgment (8).

In case of the death, or refusal or inability to act, of any arbitrator, a judge of the High Court may appoint a new arbitrator (7). All costs are to be in the discretion of the arbitrator (6). No sum is to be deducted from the compensation awarded, on account of costs, save such sum as may be directed by the arbitrator. No Court fees are to be paid prior to the award (11). The sum awarded is to be paid on the receipt of the person entitled to it.

Legally qualified medical men, whose aid may be invoked to assist the arbitrator in determining the nature and extent of the injury, are to be appointed, and paid by the Treasury.

The arbitrator is to have the powers of the County Court to procure the attendance of witnesses and production of documents (4).

Rules of Court may be made by the Rule Committee of the County Courts, under sec. 164 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), to regulate (a) the appearance before the arbitrator of one party by another person; (b) the scale and taxation of costs; (c) generally for carrying into effect the Act, so far as it affects the County Court, or an arbitrator appointed by the judge of a County Court (10).

Procedure, if Action brought.—If an action at law is brought by a workman alleging liability at common law, or under the Employers' Liability Act, 1880, and at the trial thereof the Court finds that the employer is not liable in such action, but would have been liable to pay compensation under this Act, the action shall be dismissed; but at the plaintiff's option the Court shall proceed to assess such compensation, and may deduct therefrom the costs occasioned by the plaintiff bringing an action in place of proceeding under this Act.

Notice of Injury and Time for Claim.—A claim under this Act cannot be maintained unless notice of the accident is given as soon as practicable after it happened, and before the workman has voluntarily left the service, and unless the claim for compensation has been made within six months from the time of the accident, or, if death results, from the time of death (s. 2).

The want of this notice, or any defect or inaccuracy in the same, is to be excused if the employer is not prejudiced thereby, or if the want of notice or the defect or inaccuracy therein is due to mistake or other reasonable cause (s. 2).

The requirements of the notice, and the manner in which it can be served on the employer, are the same as under the Employers' Liability Act, 1880 (ss. 4-7).

It is important to notice that, though defects and inaccuracies in the notice of the accident may be relieved against, there is no power to grant compensation if the claim is not made within six months from the date of the accident or the date of death.

It is probable that many questions will arise as to the exact meaning of "making a claim" to satisfy the demands of the Act.

Contracting Out of Act.—The employer and his workmen can contract themselves out of this Act, but only when the employer obtains from the registrar of friendly societies a certificate that the scheme of compensation, benefit, or insurance, which is to be substituted for the Act, is not less favourable to the general body of his workmen than would be the provisions of the Act itself (s. 3).

• This certificate is given for five years at the least. It may be revoked before the expiration of this time if the registrar is satisfied by complaint made by the workmen, that the scheme no longer satisfies the requirements of the Act, or that it is being mismanaged (4).

Sub-contracts.—An attempt is made by sec. 4 to deal with the evil arising out of a certain class of sub-contracts, viz. such as are made between an employer and men of little or no means, by which the latter take a part of the work comprised in his contract, and provide their own workmen or assistants. Such contracts often amount to little more than a mode of payment of the men by piecework, hired out to one of them. The desired object is to render the chief contractor—"undertaker" as he is called in the Act—responsible, at all events in the first place, for accidents occurring in the performance of his work, although let out to sub-contractors of such description.

• By the section, the "undertaker" is made liable to pay compensation to the workmen of the sub-contractor, with the right to receive indemnity from the sub-contractor.

The section does not apply to sub-contracts merely auxiliary or incidental to, but no part of, or process in, the trade or business of the undertaker.

If an employer is insured against his liability under this Act, the injured workman has a first claim on the money payable under such assurance in the case of the employer becoming bankrupt, or compounding with his creditors.

Where Injury due to act of Third Party.—Where the workman is injured in the course of his employment under circumstances creating a legal liability in some person other than the employer, the workman can either proceed at law against such person, or claim his compensation under this Act, but he cannot do both.

If the employer pays the compensation, he is entitled to indemnity from such other person.

Such cases may well arise in practice, as, where the workmen of different employers are engaged upon the same premises, or where the workman, in another employment comes upon the employer's premises and injures one of his workmen.

Employer.—For the purposes of the Act the word “employer” includes any body of persons corporate or unincorporate, and the legal representative of a deceased employer. As stated before (*ante*, p. 2), any liability of an employer to pay compensation for injury to his workman died with him by virtue of the maxim, *Actio personalis moritur cum persona*. Under this definition, however, the personal representative will be liable to pay the compensation given by this Act.

End of existing Contracts.—All existing contracts whereby a workman relinquishes any right to compensation from his employer for personal injury arising out of and in the course of his employment shall, for the purposes of this Act only, be deemed to be at an end from the time when the workman's contract of service would expire, if notice to determine it were given at the date of the commencement of this Act.

Miscellaneous Provisions.—There are various provisions in Sched. 1 enabling the employer to ascertain the condition of the injured workman, protecting him from liability to pay after the workman has recovered from the injury, and for assuring that the compensation, when paid, gets into the proper hands.

The chief of these provisions are the following:—

(a) When the workman has given notice of an accident, he shall, if required by his employer, submit himself to be examined by a duly qualified medical man, provided and paid by the employer, under penalty if he refuses, or obstructs the examination, of having his compensation or proceedings which he may be taking to obtain the same delayed (3).

(b) If the workman is receiving compensation by weekly payments, the employer, or any person by whom the employer is to be indemnified, may require him from time to time to submit to a like medical examination; but the right is reserved to the workman, instead of submitting himself to the employer's medical man, to elect to be examined by one of the medical men appointed under the Act. If he refuses to submit to such examination, or obstructs it, the weekly payments are to be suspended (11).

(c) Weekly payments of compensation may be reviewed from time to time, at the instance of either the employer or the workman, and either ended altogether, diminished, or increased (12). Where the weekly payments have been continued for not less than six months, they may be redeemed by the payment of a lump sum (13). These questions, in case of dispute arising thereon, are to be settled by the form of arbitration provided by the Act.

(d) Compensation recovered under the Act is not to be capable of being assigned, charged, or attached, nor to be subject to have any claim set off against it (14).

(e) All payments of compensation in case of death are to be made to the legal personal representative of the deceased workman for the benefit of the dependants, or, if there is no legal personal representative, to the dependants themselves. Where there are no dependants, the sum is to be paid to the person to whom the expenses for medical attendance and burial are due (4). Sums awarded to a dependant may be invested for his benefit as may be agreed, or as may be ordered by the arbitrator.

Authorities.—Roberts and Wallace, *Summary of the Law of the Liability*

of *Employers*, 3rd ed., 1885; Ruegg, *Treatise upon the Employers' Liability Act*, 3rd ed., 1898; Spens and Younger, *Employers and Employed*, 1887; Dawbarn, *E. L. Act*, 1880, 1894; Minton-Senhouse, *E. L. Act*, 1880.]

Empress of India.—See vol. ii. p. 252, article BRITISH INDIA.

Enabling Statute.—An enabling statute is a statute which makes it lawful to do something which would not otherwise be lawful. Such statutes or Acts are passed for a variety of purposes; for instance, to authorise the taking of land compulsorily to carry out some public work, or to legalise what would otherwise be a public or private nuisance. In the *Prince's* case (8 Rep. 16 *b*) it was pointed out that “a course of inheritance which is against the rules of the common law cannot be created by charter without the force and strength of an Act of Parliament.” Where the Legislature gives power to a public body to do anything of a public character, the Legislature means also to give to the public body all rights without which the power would be wholly unavailable; although such a meaning cannot be implied in relation to circumstances arising accidentally only. See *In re Dudley Corporation*, 1882, 8 Q. B. D. p. 93, where it was held that a sanitary authority, which by statute had authority as against landowners to construct sewers and a duty in favour of landowners to maintain them, were implicitly entitled to subjacent support to the sewers from lands, without purchasing the subjacent soil or any easement of support, but subject to the obligation of making compensation. An enabling statute which prescribes the way something is to be done may be either an absolute or directory enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially (see *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 733, 746). A statute frequently grants a power to enable rules, regulations, or by-laws to be made by some authority other than the sovereign and Parliament in respect of some particular matter which is not provided for by the general law of the land. Some of these rules are to be regarded as legislative acts, although they are the acts of a subordinate but delegated authority, as, for instance, the Rules of the Supreme Court. Another class of rules of a subordinate character are the by-laws of municipal authorities, and those of companies, friendly societies, railway companies, and similar bodies constituted under legislative authority.

[**Authorities.**—Hardcastle on *Statutes*, 3rd ed.; Stephens' *Commentaries*, 11th ed.; Maxwell, *Interpretation of Statutes*, 3rd ed.]

Enclave (Fr.), from the Latin *in* and *clavus*.—Territory entirely surrounded by that of a single different State. Thus the Republic of San Marino is an enclave in the kingdom of Italy. There are many enclaves in Germany, parts of different States of the German Empire being situated like islands in the midst of other such States.

Encroachment.—Encroachment (or inroad, as the word was formerly spelt) is “an unlawful gaining upon the right or possession of another” (Jacob, *Law Dict. s.v.* “Inroad”). As to encroachments

on highways, see **HIGHWAYS**. It is the duty of district councils to stop encroachments on "roadside wastes" (s. 26 (1) Local Government Act, 1894); and as to proceedings to be taken, and provisions in case of default, by district council, see sec. 26 (2) and (4). The council of every county borough has the additional powers conferred on the district council by this section (s. 26 (7)). In *Curtis v. Kesteven County Council* (1890, 45 Ch. D. 504)—a case turning on sec. 11 (1) and (6) of the Local Government Act, 1888—it was held that strips of grass bordering the metalled part of a main road are "roadside wastes." See further, **COMMON** (vol. iii. p. 138); **INCLOSURES**; *Homes v. Upton*, L. R. 9 Ch. 214 n. (mandatory injunction in case of encroachments on buttresses); **LANDLORD AND TENANT**; **FISHERIES**; **WASTE**.

Encyclical, from the Greek *ἐγκύκλιος* [*κύκλος*, a circle], a circular, confined in current application to letters issued by the pope to his clergy or the faithful on points of dogma, discipline, or morality. The expression was applied at an earlier period to similar communications by bishops, but these are now called pastoral letters (*epistolæ pastorales*). Encyclicals are issued in the form of bulls (see **PAPAL BULLS**). The famous encyclical of 8th December 1864 (*quanta cura*) against modern culture, which gave rise to the *Kulturkampf* in Germany, was accompanied by a syllabus (*q.v.*) or index (*q.v.*) stating eighty errors placed under the ban of the Roman Catholic Church. The term has recently been applied to circular letters by the Anglican Primates. Thus the reply of the Archbishops of Canterbury and York to the Papal Bull on Anglican Orders is styled "The Encyclical *Sæpius Officio*."

Encyclopædia.—The proprietor of an encyclopædia who employs a person to write an article for publication in that work cannot, without the writer's consent, publish the article in a separate form or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes (*Hereford v. Griffin*, 1848, 16 Sim. 190). *Seem*, the reservation in sec. 18 of the Copyright Act, 1842 (5 & 6 Vict. c. 45),—as to which, see **COPYRIGHT**, vol. iii. p. 396,—of the right of separate publication to the author for fourteen years after the expiration of the first twenty-eight years, does not apply to authors contributing to an encyclopædia (s. c.).

End.—As to meaning of term "end" in Income Tax Act, see *Stroud, Jud. Dict. s.v. "End."* See also in same work notes to "Expiration" and "Foot"; and article **EXPIRATION**, *inf.*

Endowed Schools.—Endowed schools form the subject-matter of the Endowed Schools Act, 1869, and amending Acts. These resulted from the recommendations of a Royal Commission, the Schools Inquiry Commission, which published its report in the year 1867. The scope and object of the Acts is the reorganisation of educational endowments, a term to which a precise and limited sense is assigned by the Acts, by means of a specially constituted Commission armed with drastic powers of making

schemes. These powers include, in particular, a general initial jurisdiction, and a liberal extension of the limits of the equitable doctrine of *cy-près*. The jurisdiction is, however, only temporary, and since 1882 the Acts have been simply renewed from year to year under the Expiring Laws Continuance Act. By the E. S. Act, 1874, 37 & 38 Vict. c. 87, s. 4, the jurisdiction was transferred to the CHARITY COMMISSIONERS, provision being at the same time made for the appointment of not more than two additional Charity Commissioners, with the requisite staff of assistant commissioners, officers, and clerks. There is at present only one Charity Commissioner so appointed, and it is to be anticipated, in view of the report published in 1895 of the Royal Commission on Secondary Education, that these temporary Acts will ere long be replaced by permanent legislation, which may be expected to deal with secondary education at large.

The term "educational endowments," for the purposes of the Acts, signifies all endowments which or the income whereof is applicable or has been applied for the purposes of education at school of boys or girls, or either of them, or of exhibitions tenable at a school or a university or elsewhere (see E. S. Act, 1869, 32 & 33 Vict. c. 56, s. 5; *cp. In re Meyricke Fund*, 1872, L. R. 7 Ch. 500; *A.-G. v. Christchurch, Oxford*, [1894] 3 Ch. 524).

The following classes of endowments are exempted from the Acts:—

1. Any school mentioned in sec. 3 of the Public Schools Act, 1868 (31 & 32 Vict. c. 118), namely, Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby, and Shrewsbury (E. S. Act, 1869, s. 8, subs. 1).

2. Any school which on the 1st January 1869 was maintained wholly or partly out of annual voluntary subscriptions, and had no endowment except school buildings or teachers' residences, or playground or gardens attached thereto (*ibid.* subs. 2).

3. (a) Any school which at the commencement of the principal Act (2nd August 1869) was in receipt of an annual parliamentary grant (*i.e.* as an elementary school), unless such school is a grammar school as defined by the Act 3 & 4 Vict. c. 77 (see article GRAMMAR SCHOOL), or a school a department of which only was in receipt of such grant (E. S. Act, 1869, s. 8, subs. 3). (b) Any school which, not being a grammar school or a department of a grammar school, was on the 1st September 1873 an elementary school within the meaning of the Elementary Education Act, 1870, with a gross average annual income from endowment during the three years next before that date of not more than £100 (E. S. Act, 1873, 36 & 37 Vict. c. 87, s. 3); an elementary school as defined by the Elementary Education Act of 1876, 33 & 34 Vict. c. 75, s. 3, being a school or department of a school at which elementary education is the principal part of the education there given, and the ordinary fee does not exceed 9d. a week. Schools exempted from the E. S. Acts either under sec. 8, subsec. 3 of the Act of 1869, or sec. 3 of the Act of 1873, may be dealt with under sec. 75 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75). This section provides that the governing body of any such schools may frame and submit a scheme to the Education Department, who may approve it, with or without modifications, as they think fit; and that the same powers may be exercised by means of such scheme as may be exercised by means of any scheme under the E. S. Act, 1869.

4. Any school (unless it is otherwise subject to the Act) which is maintained out of any endowment the income of which may, in the discretion of the governing body, be wholly applied to other than educational purposes, or any such endowment (E. S. Act, 1869, s. 8, subs. 4).

5. Any school (unless it is otherwise subject to the Act) which receives assistance out of any endowment the income of which may, in the discretion of the governing body of such endowment, be applied to some other school (*ibid.* subs. 5).

6. Any endowment applicable and applied solely for the education of the ministers of any church or religious denomination, or for teaching any particular profession, or to any school (unless it is otherwise subject to the Act) which receives assistance out of such endowment (*ibid.* subs. 6).

7. Any school which during the six months before the 1st January 1869 was used solely for the education of choristers (*ibid.* subs. 7).

The assent of the governing body of the endowment is necessary to the making of a scheme (E. S. Act, 1869, s. 14)—

1. As regards any endowment founded less than fifty years before the commencement of the Act of 1869, *i.e.* later than the 2nd August 1819 (*ibid.* subs. 1);

2. As regards the constitution of the governing body of any cathedral school, in which case the body to assent is the dean and chapter (*ibid.* subs. 2);

3. As regards the constitution of the governing body of any school of the Quakers or Moravians (*ibid.* subs. 3);

4. With the constitution of the governing body of any school, or with any exhibition (other than one restricted to any schools or school or district) forming part of the foundation of any college in Oxford or Cambridge; in which case the body to assent is the college (*ibid.* subs. 4; see also s. 38 and *In re Meyricke Fund, ubi supra*).

As to the first of these cases, where an endowment founded less than fifty years before the commencement of the Act is so mixed with old buildings, etc., that in the opinion of the Commissioners, subject to appeal to Her Majesty in Council, it cannot conveniently be separated, the whole endowment is to be deemed to have been given to charitable uses more than fifty years before the commencement of the Act, and no assent is therefore required (s. 25. But see also E. S. Act, 1873, s. 8, and *cp. In re the Free Grammar School in Swansea, etc.*, [1894] App. Cas. 259). Where the two endowments have not become so mixed and the governing body do not assent under sec. 14 (1), the scheme may provide for apportionment (see s. 26).

The case of mixed endowments generally, that is to say endowments partly educational and partly applicable to other charitable uses, is dealt with by sec. 24. Under the provisions of this section, except in so far as the governing body assent to the scheme departing therefrom, the part applicable to other charitable uses is not to be diverted from those uses, and is to be ascertained by the Commissioners, subject to appeal to Her Majesty in Council, upon the basis of the average proportion which was or ought to have been so applied during the three years prior to the passing of the Act (subs. 2), and if the proportion applicable to other charitable uses exceeds one-half, no alteration of the governing body may be made (subs. 3).

For the purposes of the Act, endowments attached to any school for apprenticeship or advancement or maintenance or clothing or otherwise for the benefit of children educated at the school are to be deemed educational endowments (s. 29). Further, under the provisions of sec. 30, dole charities and certain other non-educational charities therein specified may be applied for education with the consent of the governing body; but the tendency is for this section to be less resorted to as time goes on,

owing to the altered attitude of public opinion in regard to eleemosynary charities.

The general nature of the jurisdiction under the Endowed Schools Acts is indicated in sec. 9 of the Act of 1869, which confers upon the Commissioners power in such manner as may render any educational endowment most conducive to the advancement of the education of boys and girls, or either of them, to alter and add to any existing trusts, to make new trusts, and to consolidate or divide endowments. It has been held that the powers conferred by this section include the removal of a site (*In re the Free Grammar School, etc., at Hemsworth*, 1886, 12 App. Cas. 444; also enlargement of area, *In re St. Leonard, Shoreditch, Parochial Schools*, 1884, 10 App. Cas. 304). Such general powers are, however, subject to certain limitations and qualifications.

In the first place, it is the duty of the Commissioners in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, whether as inhabitants of a particular area or otherwise, to have due regard to the educational interests of such class of persons (E. S. Act, 1869, s. 11). And the like regard is to be had to the interests of persons in a particular class of life (E. S. Act, 1873, s. 5). As to "due regard," see *In re Free Grammar School, etc., at Hemsworth*, *ubi supra*; *In re Sutton Coldfield Grammar School*, 1881, 7 App. Cas. 91; *In re Hodgson's School*, 1878, 3 App. Cas. 857; *Ross v. Charity Commissioners*, 1882, 7 App. Cas. 463.

One of the chief difficulties in dealing with endowed schools under the old law had been the frequency of vested interests possessed by teachers and office-holders in connection with the endowments. To clear the way for the present legislation a preliminary Endowed Schools Act, 31 & 32 Vict. c. 32, had been passed in the year 1868, whereby the creation of fresh vested interests was prevented. Sec. 13 of the E. S. Act, 1869, makes provision for the saving of vested interests which had been in existence prior to the Act of 1868. Owing to the lapse of time, this saving is, of course, ceasing to have practical importance.

In regard to religion, the following provisions must in general be inserted in every scheme:—(1) A strict conscience clause for day scholars (*vide* E. S. Act, 1869, s. 15); (2) a modified form of conscience clause for boarders (*ibid.* s. 16); (3) a provision that religious opinions are not to disqualify for membership of the governing body (*ibid.* s. 17); (4) a provision that masters are not to be required to be in holy orders (*ibid.* s. 18). Under sec. 17 it has been held that the holder of an ecclesiastical office in the Church of England cannot lawfully be made an *ex officio* member of the governing body (see *In re Hodgson's School*, *ubi supra*). This provision is, however, modified by sec. 6 of the E. S. Act, 1873, which authorises the retention of the holder of a particular office who is a member of the governing body under the express terms of the original instrument of foundation.

Where a scheme gives the governing body power to make regulations for religious instruction it must provide for a year's notice of any alteration of such regulations (E. S. Act, 1873, s. 11). It is the practice in schemes for endowments not falling under sec. 19 of the principal Act (see *post*) to provide for religious instruction according to the principles of the Christian faith.

Certain classes of schools are exempted from the provisions of the principal Act as to religion, other than the day scholars' conscience clause,

except in so far as the governing body, constituted as if no scheme had been made, assent to such scheme; and in these cases no provision (save as aforesaid) affecting religion or religious instruction may be inserted in the scheme without the consent of the governing body (E. S. Act, 1869, s. 19). The exemptions are—

1. Cathedral schools (*ibid.* subs. 1);

2. Any educational endowment, if by the express terms of the original instrument of foundation or of the statutes or regulations made by the founder or under his authority in his lifetime, or within fifty years after his death (which terms have been observed down to the commencement of the Act), it is required (a) that the scholars should be instructed according to the doctrines or formularies of any particular church, sect, or denomination (*ibid.* subs. 2); or (b) in the case of any educational endowment originally given to charitable uses since the Toleration Act, 1688 (1 Will. & Mary, c. 18), that (i.) the majority of the members of the governing body or persons electing the governing body, or (ii.) the principal teacher, or (iii.) the scholars shall be members of a particular church, sect, or denomination (E. S. Act, 1873, s. 7). The expression "express terms" is construed strictly (see *In re St. Leonard, Shoreditch, Parochial School, ubi supra*; see also *Ross v. Charity Commissioners* and *In re Free Grammar School, etc., at Hensworth, ubi supra*).

The Commissioners under the E. S. Acts are empowered to provide in every scheme, except in the case of cathedral schools, for the transfer of the jurisdiction of the Visitor to Her Majesty, to be exercised only through the Charity Commissioners (E. S. Act, 1869, s. 20); and they must in every scheme provide for the abolition of the jurisdiction of the ordinary as to licensing masters (*ibid.* s. 21). As to visitatorial powers, see *Tudor's Charitable Trusts*, 3rd ed., p. 77, and art. VISITATION OF CHARITIES.

For purposes of inquiry, the Commissioners and Assistant Commissioners under the E. S. Acts have the same powers as to production of documents and attendance and examination of witnesses as are conferred on Commissioners and inspectors (now Assistant Commissioners) under the Charitable Trusts Acts (E. S. Act, 1869, s. 49). The statutory procedure for making schemes is as follows:—

1. The draft scheme is first printed and published for a period of two months, during which objections and suggestions are received by the Commissioners (E. S. Act, 1869, ss. 33, 34; E. S. Act, 1873, s. 12). At the conclusion of this period an inquiry concerning the draft scheme may be held if the Commissioners think fit (E. S. Act, 1869, s. 35).

2. The scheme is then finally framed by the Commissioners and submitted for approval to the Committee of Council on Education (s. 36), by whom it is published, with the notice that objections and suggestions will be received during the period of one month, at the expiration of which period it may either be approved or remitted to the Commissioners for amendment (E. S. Act, 1873, s. 13).

3. The scheme, as finally approved by the Committee of Council, is published and circulated (E. S. Act, 1873, s. 13). Within two months of such publication one or other of the following measures may be adopted against it: (a) a petition of appeal may be presented to the Privy Council (E. S. Act, 1869, s. 39; 1873, s. 14); (b) a petition may be presented to the Committee of Council on Education praying that the scheme may be laid before Parliament (E. S. Act, 1873, s. 13).

• An appeal to the Privy Council against a scheme may be made (E. S. Act, 1869) (a) by the governing body of any endowment to which

the scheme relates, or any person or body corporate directly affected by such scheme on the ground—

(1) Of any decision of the Commissioners in a matter in which an appeal to Her Majesty in Council is given by the Act (cp. ss. 19, 24, 25, 26; E. S. Act, 1873, s. 8); or

(2) Of the scheme not saving or making due compensation for his or their vested interests as required by the Act (cp. s. 13); or

(3) Of the scheme being not within the scope of, or made in conformity with, the Act (cp. *In re Free Grammar School, etc., at Hemsworth, ubi supra*); or (b) by the governing body only, on the ground—

(4) Of a scheme not having due regard to any educational interests, to which regard is required by this Act to be had, on the abolition or modification of any privileges or educational advantages to which a particular class of persons are entitled (cp. s. 11).

As to "directly affected," see *In re Shaftoe's Charity*, 1878, 3 App. Cas. 872; *In re Sutton Coldfield Grammar School*; *In re Free Grammar School, etc., at Hemsworth, ubi supra*. Appeals to the Privy Council are not allowed in the case of endowments where, during the three years preceding the commencement of the principal Act, the average annual income was not more than £100 (s. 42). Appeals are referred to the Judicial Committee of the Privy Council (E. S. Act, 1873, s. 14).

When a petition has been presented to the Committee of Council on Education, the scheme must be laid before both Houses of Parliament for two months, after which, unless an address has been presented during that period by either House praying Her Majesty to withhold her consent, Her Majesty may approve the scheme (E. S. Act, 1873, s. 15).

4. Approval by the Queen in Council is the final stage of the procedure. If this is withheld, the Commissioners may prepare a new scheme (E. S. Act, 1869, s. 43). No scheme takes effect until approved by the Queen, and when so approved it has the force of an Act of Parliament (s. 45).

It remains to add that during the continuance of the Acts the jurisdiction of the Court (except with the consent of the Committee of Council on Education) is ousted as to any endowed school or educational endowment which can be dealt with by a scheme under the Acts (E. S. Act, 1874, s. 6; cp. E. S. Act, 1869, s. 52). This provision, of course, does not apply in the case of a mixed endowment, as to which, by reason of the dissent of the governing body, a scheme cannot be made under the Acts (cp. *A.-G. v. Moyses* stated in *Tudor's Charitable Trusts*, App. III.).

[*Authorities*.—*Tudor's Charitable Trusts*, 3rd ed.; *Mitcheson's Charity Commission Acts*. See also SCHOOL.]

Endowment.—See CHARITIES; CHURCH OF ENGLAND (vol. iii. p. 14); ENDOWED SCHOOLS; FRIENDLY SOCIETIES.

Enemy.—The treatment of the person of belligerents varies according as they are combatants or non-combatants. Combatants may be attacked so long as they resist, and may be destroyed by any legitimate means; if, however, they surrender, they are entitled to be treated as prisoners of war. With regard to non-combatants, the rules of war prescribe that they are not to be attacked unless they in some way show

active hostility. See **ENEMY'S GOODS**; and for a full treatment of the subject, **BELLIGERENT**; **NEUTRALITY**; **WAR**.

Enemy's Goods.—On the outbreak of hostilities between two States, international law sanctions the appropriation by each belligerent of certain kinds of property belonging to the other. Public property, such as ships and munitions of war, may be seized, but private property within a State is now usually regarded as exempt from confiscation, subject, however, to the right of the army in occupation to levy contributions and make requisitions. Private property of the enemy at sea has usually been considered legitimate prize, although some States have contended against the principle, and entered into treaties excluding it. By the Declaration of Paris in 1856, to which most civilised States, with the exception of the United States of America, were parties, enemy's goods, with the exception of contraband of war, are declared protected by a neutral flag, and neutral goods, with the like exception, in enemy's ships are similarly protected. By the law of England, enemy's goods seized in English ports and creeks go to the Crown as droits of Admiralty. See **NEUTRALITY**; **WAR**.

Enfranchisement.—See **COPYHOLD**; **SLAVE TRADE**; etc.

Engage; Engagement.—Words synonymous with to "contract" and a "contract." In a deed the word "engage" is sufficient to constitute a covenant, since it shows that the parties bind themselves to do a certain act (*Rigby v. Great Western Ryw. Co.*, 1845, 15 L. J. Ex. 62; 14 Mee. & W. 816).

Engine.—A snare is an "engine or instrument" within the meaning of sec. 3 of the Game Act, 1831 (*Allen v. Thompson*, 1870, L. R. 5 Q. B. 336).

Engineer.—Engineers in this country are divided between two principal branches, the civil and mechanical engineers. The distinction between the two branches is, speaking generally, that civil engineers plan and carry out works of construction, such as roads, bridges, docks, and railways, and mechanical engineers design and construct machinery. Numerous subordinate divisions of the profession are recognised, some of which are indicated by the terms, "consulting," "railway," "sanitary," "drainage," "electrical" engineer.

1. There are no rules of law or statutes applying to engineers as such.

2. There is no public examination for engineers, and no English diploma. Anyone is at liberty to undertake engineering work, and should he be negligent or incompetent in performing it, is liable to his employer for any damage the latter may incur by reason of his not possessing and using ordinary skill and care (see *Lanphier v. Phipps*, 1838, 8 Car. & P. 475, and the article on **PRINCIPAL AND AGENT**).

3. No customary or recognised scale of charges payable to the engineer employed to design or conduct such works exists which corresponds to the scale of the Royal Institute of British Architects.

4. The nature of their professional avocations, and the forms of the contracts to which civil engineers, in particular, frequently become parties, or by virtue of which they undertake special duties, bring them chiefly in contact with those branches of the general law which deal with principal and agent, and with arbitration. In general, the position of an engineer in its legal relations is much the same as that of an architect (see vol. i. p. 318). It is proposed in this article to refer only to a few points which frequently arise out of contracts for the construction of engineering works.

5. *Certificate*.—If payment to the contractor is made to be dependent upon a certificate for the amount being given by the engineer employed, the contractor cannot sue for payment, or on a *quantum meruit*, at law or in equity (*M'Intosh v. Great Western Ry. Co.*, 1850, 2 Mac. & G. 74; *De Worms v. Mellier*, 1873, L. R. 16 Eq. 554), before the certificate is given, even though it be not given by the fault of the engineer (*Clarke v. Watson*, 1865, 18 C. B. N. S. 278), or sue the engineer for damages (*Stevenson v. Watson*, 1879, 4 C. P. D. 148), unless the certificate is withheld by fraud (*l.c.*, *M'Intosh v. Great Western Ry. Co.*, *supra*; *Sharpe v. San Paulo Ry. Co.*, 1873, L. R. 8 Ch. 597), or by collusion (*Batterbury v. Vyse*, 1863, 2 H. & C. 42; see cases cited below, 9.), or arrangement (*Kimberley v. Dick*, 1871, L. R. 13 Eq. 1) between the employer and the engineer. The certificate need not be in writing unless the contract so requires (*Roberts v. Watkins*, 1863, 14 C. B. N. S. 592; see *Tharsis Sulphur Co. v. McElroy*, 1878, 3 App. Cas. 1040, and below, 7.). See Leake on *Contracts*, 3rd ed., p. 557.

6. If the contract contains an arbitration clause, a claim to payment, notwithstanding that the certificate is withheld, may be within the clause (*Hohenzollern & Gesellschaft v. Contract Corporation*, 1886, 54 L. T. 596), but where there is such a clause, the contract may, and often does make the engineer's certificate conclusive and indispensable (*Sharpe v. San Paulo Ry. Co.*, *supra*). The certificate is not the award of an arbitrator; it is more nearly analogous to a valuation (*l.c.*, *Miles v. Bailey*, 1863, 2 H. & C. 36; but see Russell on *Arbitration*, 7th ed., p. 679).

7. As to the authority of an engineer in charge of works on behalf of the employer, see Hudson on *Building Contracts*, ch. ii.; *Lawson v. Wallasey L. B.*, 1882, 52 L. J. Q. B. 302; *Tharsis Sulphur Co. v. McElroy*, *supra*; and *Roberts v. Bury Commissioners*, 1869, L. R. 4 C. P. 755; 5 C. P. 310. Where a written certificate is required, he has no authority to bind the employer by a verbal promise to pay (*Sharpe v. San Paulo Ry. Co.*, *supra*; *Lawson v. Wallasey L. B.*, *supra*), and he cannot as an arbitrator determine the question whether he has such authority (*l.c.*).

9. *Arbitration*.—The contract very frequently provides that all questions in dispute shall be referred to the engineer as arbitrator (see ARBITRATION, vol. i. p. 298). The submission in such a case will be enforced by the Court, notwithstanding that the engineer may have formed an opinion on the matter in dispute before hearing the parties, at any rate if he has not made up his mind so as not to be open to change it upon argument (*Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238), and notwithstanding that he may probably be biassed in favour of the employer's contention, unless there is sufficient reason to expect that he will not act fairly (*Eckersley v. Mersey Docks Board*, [1894] 2 Q. B. 667; *Ives & Barker v. Williams*, [1894] 2 Ch. 478).

The reason of this exception to the usual course pursued by the Court in respect to arbitrations is that the parties know that the engineer cannot be expected to come to the question "with a mind free from the human weakness of a preconceived opinion." "The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary

arbitrator are natural and to be looked for, neither party proposed to exact." "The parties relied on the engineer's professional honour, his position, and his intelligence." The contractor has a right to expect that he will be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard. The question is, has he done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed, or even strong, views, but as an honest judge of this very special and exceptional kind? (per Bowen, L.J., in *Jackson v. Barry Rwy. Co.*, *supra*).

10. Where a contract with a railway company provided for the reference of disputes to A. B., if he should continue to be the principal engineer of the company, and the company amalgamated with another, it was held that the submission was binding so long as A. B. had control of the line of the first-named company (*In re Wansbeck Rwy. Co.*, 1866, L. R. 1 C. P. 269).

[*Authorities.*—See generally Hudson on *Building Contracts*, 2nd ed., ch. ii.; and an essay by Mr. W. C. Glen in Donaldson's *Handbook of Specifications*, ed. 1860. Forms of contracts for the construction of engineering works are given in Hudson, vol. ii.]

English Channel District.—The English Channel pilotage district is defined by sec. 618 of the Merchant Shipping Act, 1894, as consisting of the seas between Dungeness and the Isle of Wight. The examination and licensing of pilots within this district is by the same section imposed on the Trinity House (*q.v.*).

English Information.—See INFORMATION.

Engravings.—See COPYRIGHT.

Engross; Engrossing; Engrossment.—1. (a) Copying out a statute or legal instrument in a large, fair, legal hand; (b) the copy so made. Until 1849 all Acts of Parliament when passed were engrossed in black letter on the Parliament Roll. The history of the practice and of the handwriting used is given in Clifford on *Private Bill Legislation*, vol. i. pp. 317–322. In 1849 vellum prints of the Acts were substituted for the engrossments. These terms, as used in this sense, are derived from *ingrossare*, *engrosser*, to write large.

2. To buy up standing corn or victuals (*R. v. Waddington*, 1800, 1 East, 143, 167; 6 R. R. 238) wholesale for the purpose of regrating, i.e. retailing at monopoly prices (5 & 6 Edw. VI. c. 14, s. 2). This corresponds to what is in modern parlance termed making a "corner" in a commodity. In this sense it is derived from French *en gros*, as distinguished from *en détail*.

During the Middle Ages in England the Legislature made repeated attempts, in accordance with mediæval notions of commerce and political economy, to repress as a crime the engrossing of commodities, and prevent as far as possible all middlemen between producer and consumer. It is not improbable that the intervention was also caused by the fact that engrossing or forestalling rendered it unnecessary for the producer to take his commodities to an open market or fair, and *pro tanto* reduced the market tolls and profits. There is the more reason for this view that legislation against

engrossing went on *pari passu* with the practice of granting monopolies, until that was put a stop to by the Statute of Monopolies (21 Jac. I. c. 3; see Pike, *Hist. Cr.* vol. i. pp. 101, 294). Many statutes were passed, beginning with the *Judicium Pillorie*, 51 Hen. III. st. 6 (Ruffhead), to deal with forestalling, regrating, and engrossing. The most important are those of Edward VI. (5 & 6 Edw. VI. c. 14) and George III. (12 Geo. III. c. 71). The latter Act was repealed by 7 & 8 Vict. c. 24, which absolutely abolished the offences of badgering, engrossing, forestalling, and regrating, whether at common law or under any statute. The Act (s. 4) contains a reservation that it is not to be read as applying to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumour with intent to enhance or decri the price of any goods or merchandise (*Scott v. Brown*, [1892] 2 Q. B. 724), or to the offence of preventing or endeavouring to prevent by force or threats any goods or merchandise being brought to any fair or market.

The abolition of the offence makes it unnecessary to go into detail as to its elements or the decisions and proceedings with respect to it. The authorities on the old law are collected in Hawk., P. C., bk. i. c. 80; Burn's *Justice*, 28th ed., tit. "Forestalling"; 4 Black. Com. 158, 159; and the old law is now only of historical interest except so far as it is necessary to explain the decisions with respect to combinations in restraint of trade (see COMBINATIONS; CONSPIRACY; RESTRAINT OF TRADE), or to consider the legality of trusts and syndicates, which in England have not much troubled the Courts. In fact, combinations which were at one time subject of indictment (*Cousins v. Smith*, 1807, 13 Ves. 542; 9 R. R. 217; *R. v. Webb*, 1811, 14 East. 406) are now the *ratio essendi* of joint stock companies or commercial syndicates (the *Mogul* case, [1892] App. Cas. 25).

In the United States much litigation has arisen, and is pending, with respect to the legality of trusts and combinations for engrossing and monopolising commodities. See Bishop, *Crim. Law* (U.S.), vol. i. ss. 518-529; *People v. Sheldon*, 1893, 139 N. Y. 90.

Enlarger l'estate.—A species of release, the words, viz. "enlarging the estate," having reference to the way by which the release enures, *e.g.* a release to a tenant for life or years by a remainderman or a reversioner of his remainder or reversion, the life tenant thereby acquiring an estate in fee-simple. But the releasee must have a vested estate giving a present or future right of enjoyment for the release to work upon; for if there be a lessee for years before he enters, and is in possession, and the lessor releases to him all his right in the reversion, such release is void for want of possession in the releasee (Lit. s. 459; 2 Black. Com. 324). There must also be privity of estate between the releasor and releasee; that is to say, the two estates together must make one and the same at law. The phrase is used to distinguish this species of release from the other four enuring by way of (1) *mitten l'estate* (*e.g.* coparceners; see PARCENERS), where the whole estate passes, (2) *mitten le droit* (by way of passing a right), (3) *extinguishment* (extinguishing a right), (4) *entry and feoffment*; in all which four the fee-simple may be conveyed without the use of words of inheritance (2 Black. Com. *loc. cit.*; Stephen's *Commentaries*, vol. i. c. xvii.).

Enlistment (Army).—By the Statute 16 Car. I. c. 28, 1640, the impressment, or compulsory service, of men in forces raised by the sole

power of the Crown to serve outside the country, was declared to be illegal, "save in case of necessity of invasion, or by reason of tenure." Enlistment or engagement for service of soldiers in the army as sanctioned by the annual Army Acts passed since 1689 has been entirely voluntary, and is now regulated by the Army Act, 1881 (44 & 45 Vict. c. 58, ss. 76-101), and subsequent amendments.

1. *Period of Service for which the Soldier engages.*—By sec. 76 the period is for twelve years, or for such less period as may be from time to time fixed by the Queen's Regulations, but not for any longer period; and this period for which a person enlists is the term of the "original enlistment." The conditions of enlistment for the various branches of the service, and the conditions of transfer from one corps to another, are prescribed by the Queen's Regulations.

The original enlistment may be (a) either for the whole term in "army service," or (b) for such portion of the original enlistment as is from time to time fixed by the Secretary of State, and specified in the attestation paper (*infra*) in "army service"; and for the residue of the said term in the reserve, *i.e.* the Army Reserve, under the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). But these conditions may be varied, and a soldier may be permitted to go into the reserve at once, or to serve all his time up to the term of his original enlistment with the colours, or to extend his original enlistment up to the permitted limit of twelve years. So, too, a man may be permitted to re-enter the army service for any unexpired residue of his original enlistment, or for any period not exceeding the twelve years (s. 78).

The service is reckoned from the date of the attestation; but in case of desertion or fraudulent enlistment (see *infra*), the soldier will forfeit all his prior service, and be liable to serve for his full term reckoned from his conviction or confession, unless the Secretary of State orders otherwise; and with it his pay or deferred pay, and whatever service he has made towards pension, etc. (Queen's Regulations, s. vi. 160). But he does not forfeit service towards discharge for any service, or period of imprisonment, but may be discharged, or sent into the reserve at the usual time. In these respects, however, soldiers enlisted or engaged before the commencement of the Army Discipline and Regulation Act, 1879 (42 & 43 Vict. c. 33), remain subject to that Act, unless they have agreed otherwise.

An army reserve man who enlists may be sent back to the reserve; and he does not forfeit his service; but if retained with the colours his service is reckoned from his improper attestation (Queen's Regulation, s. xix.).

2. *Re-engagement and Prolongation of Service.*—In accordance with the provisions of sec. 84, after nine years of service the soldier may be re-engaged for such further period as may make up a total of twenty-one years—inclusive of any period served in the reserve; and after its completion, or within a year of it, he may continue, with the approval of the competent military authority, in the service, but may claim his discharge by giving three months' notice (s. 85); but this is only allowed in special cases.

The Queen's Regulations, sec. xix., contain the rules for carrying out these sections, and also of sec. 86 in the case of non-commissioned and warrant officers.

If a state of war exists when the soldier is entitled to his discharge, or he is on foreign service, or the reserves are called out, he may be detained for not longer than twelve months further; and there is a similar provision if he is entitled to go into the reserve at such conjunctures (s. 87).

Under sec. 88 Her Majesty in Council may by proclamation, in case of imminent national danger, or of great emergency, the occasion being first communicated to Parliament if it is sitting, or if not, then stated in the proclamation, order that soldiers entitled in pursuance of the terms of their enlistment to be transferred to the reserve, shall continue in army service; and they must serve as if having been transferred to the reserve they had been called out under the enactments relating to the reserve. See RESERVE FORCES.

3. *Proceedings for and Provisions as to Enlistment.*—Under sec. 93 the regulations authorise certain persons to be recruiters, and they must give to every person offering to enlist a notice in authorised form, called the attestation paper, stating the general requirements of attestation, and the general conditions of the contract to be entered into by the recruit, and directing him to appear before a justice of the peace. If he does not appear, or, on appearing, does not assent to be enlisted, no further proceedings are taken; but if he does, and the justice having ascertained that he assents, and is not under the influence of liquor, cautions him as to punishment in case of false answers to the attestation paper, and having duly recorded the answers requires him to make and sign a declaration of their truth, and administers the oath of allegiance. Thereupon he is deemed to be enlisted; his enlistment dates from the attestation; until then no account will be taken of him as a soldier; and it is not necessary any longer for the recruiter to make the gift of a shilling. The paper attested by the justice's signature is given to the recruiter, and at the recruit's request the officer who finally approves of him must furnish him with a certified copy. Officers may now act as justices of the peace for attesting recruits if authorised by the regulations of a Secretary of State (s. 94); and the same section also empowers certain other persons so to act in India and the colonies and elsewhere; but an officer cannot recruit unless authorised by the regulations.

Within three months from the date of the attestation the recruit can purchase his discharge on payment of a sum not exceeding £10, unless it is claimed when soldiers, otherwise entitled to go into the reserve, are retained by proclamation as above mentioned; in which case the recruit may be also retained for the period of continuance of the army service; but on its termination he may then, on payment of the above sum, be discharged (s. 81).

Recruits may, according to regulations from time to time made by the Secretary of State, be enlisted in a particular corps; but, except as so provided, enlistment is for general service. The competent military authority, who is (s. 101) the commander-in-chief, adjutant-general, or any officer prescribed on their behalf, is, as soon as practicable, to "appoint" a recruit to the corps for which he has enlisted, or to some corps of the regular forces if the enlistment is for general service. This appointment does not require the soldier's consent; but after he is appointed he cannot, except with his consent, be moved out of it, that is "transferred," except under the provisions of sec. 83, by which within three months he may be transferred to any corps of the same arm or branch of the service, or under other special conditions of the section, for the purpose of retaining him in a place where the corps removes, or as a punishment. But without his consent he may be "posted" within his own corps, e.g. if he is in an infantry corps he may be posted to a battalion of his territorial or other regiment or to the permanent staff of any volunteers belonging to that regiment; and so on for other arms or branches of the service.

All natural born subjects, irrespective of religious profession, are legally

capable of enlisting; and foreigners, as stated below; and minors may be enlisted notwithstanding that enlistment is in the nature of a contract. In *R. v. Rotherfield Greys*, 1823, 1 Barn. & Cress. 345, it was said that although parental authority continues until the child is twenty-one, yet public policy requires that a minor should be at liberty to contract an engagement with the State; and the parental authority is suspended, though not destroyed. Apprentices under age are specially dealt with in the Army Act in order to preserve the claims of their masters.

The engagement disables the soldier from making any other contract of service; he may, however, contract marriage, but no provision is made for wives beyond a percentage which the State sanctions. He is liable for his wife's maintenance, and for his bastard children, just as a civilian; except that execution may not issue against his person, pay, arms, etc.; and he is not liable to punishment for desertion or neglect to maintain them or leaving them chargeable to a union (s. 145 of Army Act). If a parish claim a soldier for wife desertion, he is discharged, and handed over to any constable holding a warrant for his apprehension (see s. 145 of Army Act for provisions as to deduction of pay).

A soldier retains the domicile which he had on entering the service wherever he may be stationed, and also his parochial settlement (see as to domicile, *Dicey, Conflict of Laws*, p. 148, and the cases there cited; and on settlement, *Horton v. Leeds*, 1855, 5 El. & Bl. 595, where it was also held that the period of service as a soldier is not counted in the five years whereby irremovability by residence may be claimed).

By sec. 95 aliens can only be enlisted with the assent of Her Majesty, signified by a Secretary of State, and in the proportion of one to fifty British subjects in any one corps; but there is no such restriction on negroes or persons of colour (s. 95; and see article ARMY). A master may claim his apprentice under twenty-one, if bound by regular indenture for four years and under sixteen when bound. But the master must, within one month after the apprentice has left his service, take the oath prescribed in the first schedule of the Act before a justice of the peace, and get an order from a Court of summary jurisdiction for the delivery of the apprentice. If a bounty is payable to the apprentice, the master is entitled to receive such portion of it as was not paid before notice of the apprenticeship (s. 96). Indentured labourers in colonies where recruiting is done for the forces forming part of the regular forces (see ARMY) are subject to similar provisions (s. 97). The publication without due authority of notices or advertisements relating to recruiting, the opening of a house or place of rendezvous or office for recruiting, receiving any person under such advertisement, or interference with the recruiting service, are offences punishable on summary conviction by fine not exceeding £20 (s. 98).

False answers knowingly made by the recruit to any question in the attestation paper render him liable on summary conviction to imprisonment, with or without hard labour, for not exceeding three months; and he may also be proceeded against alternatively by court-martial; and, in either case, may be tried where he may happen to be, or where the offence was committed (ss. 99, 159, 166). Discharge on the ground of errors or illegalities with regard to the attestation, enlistment, or re-engagement cannot be claimed after three months, if the soldier has been in receipt of pay; but if the illegality is something which goes to the incapacity of the soldier to serve at all, as, *e.g.*, if he is an alien, then the discharge may be claimed at any time. But in both cases he is to be deemed, for all the

purposes of the Act, a soldier until he has actually been discharged (s. 100 (1) (2)).

4. *Fraudulent Enlistment and other Offences in relation to Enlistment.*—Every person subject to military law is deemed guilty of fraudulent enlistment who, when belonging to either the regular forces or the militia, when embodied, without having first obtained a regular discharge therefrom, or otherwise fulfilled the conditions enabling him to enlist, enlists in the regular forces, the militia, or any of the reserve forces, not subject to military law, or enters the navy (s. 13). The punishment by court-martial for a first offence is imprisonment; for a second, penal servitude, as laid down in sec. 44, i.e. not more than two years of imprisonment, and not less than three years' penal servitude.

A person who has been discharged with disgrace from the army or navy, and enlists in the regular forces without declaring the circumstances, is liable to imprisonment on conviction by court-martial; and false answers on enlistment by a person who has become subject to military law also render such person liable to the same punishment (ss. 32, 34).

5. *Discharge and Transfer to Reserve.*—A soldier who has been invalided from service beyond the seas, or when his corps, or the part thereof in which he is serving, is ordered for service beyond the seas, and he is unfit by reason of his health, or is within two years of the end of his period of original enlistment, may be transferred to the reserves (s. 89). Discharge can only be by sentence of court-martial with ignominy, by order of the competent military authority (see Rules of Procedure, 1893, r. 127, as to this), or by the direct authority of Her Majesty (s. 92). He may thus be discharged at any time if his services are not required, this being in the terms of his attestation; but by subsec. (2) he is entitled to receive a certificate of discharge; and until the formalities of discharge are completed he continues subject to military law (s. 90 (1)). If he is serving beyond seas when entitled to be discharged, he may demand to be sent to the United Kingdom if he were enlisted there, free of expense, and on his arrival to be discharged; and he is also entitled to be conveyed free of cost from the place in the United Kingdom where he is discharged to the place in which he was attested, or elsewhere if the cost of conveyance is not greater (s. 90 (2)).

If a soldier who is discharged is a lunatic, he and his wife and child, or any of them, may, by order of the Secretary of State, be sent to the parish or union to which he is chargeable, and the master or other proper officer of the workhouse must receive them; but if the soldier is a dangerous lunatic, he may be sent direct to an asylum, or elsewhere where pauper lunatics can legally be confined; and he will in like manner become chargeable to his parish or union (s. 91).

[*Authorities.*—Clode, *Military Forces of the Crown*, vol. ii.; Thomson, *Military Forces of Great Britain*, Pt. I. sec. vii.; *Manual of Military Law* (War Office, 1894). See ARMY; COURTS MARTIAL; FOREIGN ENLISTMENT; RESERVE FORCES; MILITIA; VOLUNTEERS; YEOMANRY.]

Enrolment.—Enrolment is now effected, under Order 61, in the Enrolment Department of the Central Office, to which has been transferred the business previously performed in the Enrolment Office.

Enrolment of Decrees, Judgments, or Orders.—Previously to the Judicature Acts and under the old practice of the Court of Chancery, a decree did not, strictly speaking, become a record of the Court until it had been enrolled

(Seton on *Judgments*, 5th ed., p. 169; Daniell's *Ch. Pr.*, 6th ed., p. 812), and as, after enrolment, a decree was not susceptible of alteration except by the House of Lords, or by bill of review (Dan. 812), it was not unusual to enrol decrees in order to obviate the necessity of an intermediate appeal. Under the existing practice, however, appeals to the House of Lords are not from the High Court of Justice, but from any judgment or order of the Court of Appeal (see the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3). It is, moreover, expressly provided by the Rules of Court (see Order 61, r. 8) that "it shall not be necessary to enrol any judgment or order, whether dated before or since the commencement of" the Judicature Act. Enrolment, therefore, except under special statutes, is now a useless ceremony (*Hastie v. Hastie*, 1876, 2 Ch. D. 304, 307). Enrolment under the provisions of the Statute 41 Geo. III. c. 90, s. 6, is still necessary for the purpose of enforcing in this country a judgment made by the Chancery Division of the High Court of Justice in Ireland. Under this statute where in any suit between party and party any judgment is pronounced or order made for payment or for accounting for money in the Chancery Division in Ireland, upon application to the Lord Chancellor of Ireland a copy of such order or decree may be exemplified and certified to the Chancery Division in England under the Great Seal of Ireland; the judgment or order when so exemplified (see EXEMPLIFICATIONS) and certified may be ordered to be enrolled, and when so enrolled may be enforced by process against the person of the party against whom it has been made as fully and effectually as if such judgment or order had been originally made in the Chancery Division in England. The order for enrolment will be made by the Lord Chancellor, on petition of course, and a docket of enrolment is then prepared and completed (Dan. 845). For form of order for enrolment, see Seton, 170; and as to the practice generally, see Dan. 812-818. For a case in which an order so enrolled was enforced by attachment, time being given to the defendant to apply to the Irish Court to discharge their order which he alleged to have been irregularly obtained, see *Newell v. Newell*, 1896, W. N. p. 160. There is no jurisdiction to enrol a judgment of a Scotch Court (*In re The Dundee Suburban Ry. Co.*, 1889, 58 L. J. Ch. 5; 59 L. T. N. S. 720; 37 W. R. 50); but if such a judgment be for any debt, damages, or costs, a certificate of an extract thereof may be registered under the Judgment Extensions Act, 1868 (31 & 32 Vict. c. 54). See *Annual Practice*, pp. 799 *et seq.* For form of order for enrolment of an order of the Arches Court of Canterbury under 2 & 3 Will. IV. c. 93, see Seton, 171.

Enrolment of Deeds.—Under Order 61, r. 9, all deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the Courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the Enrolment Department of the Central Office. By rule 12 all acknowledgments required for the purpose of enrolling any deed or other document may be made before the clerk of enrolments or before a master, as occasion may require. By rule 13 the records of all deeds and recognisances enrolled are to be sent by the clerk of enrolments, so long as that office shall continue, or by the proper officer of the Enrolment Department, to the Public Record Office, Rolls Yard, within two years from the time of the enrolment thereof. The enrolment of disentailing assurances is provided for by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), s. 41. After enrolment, the Court has jurisdiction to rectify such a deed so as to make it carry out the intention of the parties (*Hall Dare v. Hall Dare*, 1886, 31 Ch. D. 251; 55 L. J. Ch. 254). As to presuming enrolment, see Shelford's *Real Property*

Statutes, 9th ed., p. 112; and as to enrolment of disentailing and other deeds, *ibid.* pp. 273, 290, 291.

Under the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), a priest or deacon in the Church of England is enabled to relinquish office by executing and enrolling a deed of relinquishment. As to vacating such enrolment on change of intention by the party, see *In re a Clergyman*, 1873, L. R. 15 Eq. 154. As to the enrolment of assurances of land or personal estate to be laid out in the purchase of land to or for the benefit of charitable uses under the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), see Seton, 1136, 1137, and for form of order to enrol such deed after the proper time, *ibid.* 1128. As to enrolment of deeds relating to the appropriation of settled land for streets and public purposes under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 16), see Vaizey on *Settlements*, 682; Shelf. *R. P. S.* 684. As to enrolment of recognisances, see Order 61, r. 14, and as to enrolment of schemes under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), see Order 61, rr. 10, 11; Dan. 2182; Seton, 2051. As to searches for enrolled deeds, see SEARCHES.

Entail.—See ESTATES OF INHERITANCE.

Entering (or Marking) Short.—See DEPOSIT.

Entertainment.—See DANGEROUS PERFORMANCES; PUBLIC ENTERTAINMENT; REFRESHMENT HOUSE; and similar headings.

Enticing.—See ABDUCTION; KIDNAPING; MASTER AND SERVANT.

Entire Contract.—A contract is said to be entire when it can only be fulfilled as a whole, *i.e.* when failure in any part is failure in the whole. See CONDITIONS (vol. iii. p. 252); CONTRACT (vol. iii. p. 350); DIVISIBLE CONTRACTS (vol. iv. p. 322).

Entireties, Tenancy by.—See HUSBAND AND WIFE; JOINT TENANCY.

Entitled.—"The word may without any violence to language mean entitled in interest or entitled in possession, that is, entitled to payment" (*Jopp v. Wood*, 1865, De G., J. & S. at p. 329). The interpretation is in each case a question of construction, and no definite rule can be laid down. As to whether "entitled" alone means entitled in possession, see *Chorley v. Loveband*, 1864, 33 Beav. 189; *In re Gryle's Trusts*, 1868, L. R. 6 Eq. 584; *Umbers v. Jaggard*, 1870, L. R. 9 Eq. 200, quoted in Jarman on *Wills*, 5th ed.; see also *Johnson v. Foulds*, 1868, L. R. 5 Eq. 268.

The same difficulty of interpretation arises in gifts over on death of a person before being "entitled," the *prima facie* interpretation being "entitled in interest," not necessarily "in possession." Some cases on both sides are

collected in Jarman on *Wills*, 5th ed., pp. 1625, 1626 (cap. xlix.). But notice that where testatrix appointed certain proceeds of sale after death of A. to be equally divided among her nephews and nieces, but should any of them die before they were entitled to the property leaving issue, gave the share of such niece or nephew dying to her children, and three of the remaindermen, though surviving the testatrix, predeceased A., leaving children living at his death, it was held that entitled meant entitled in possession, and the earlier cases were distinguished (*In re Noyce, Brown v. Rigg*, 1885, 30 Ch. D. 75).

The *prima facie* meaning of "entitled" in a wife's covenant in a marriage settlement to settle property to which she shall become "entitled" is "entitled during the coverture" (*In re Edwards; In re London, Brighton, and South Coast Ry. Act*, 1873, L. R. 9 Ch. 97, following *Dickinson v. Dillwyn*, 1869, L. R. 8 Eq. 546; and *Carter v. Carter*, 1869, L. R. 8 Eq. 551).

In "is now entitled" in a similar covenant in a marriage settlement, "entitled" is interpreted as "entitled in right or interest," and therefore the covenant binds the intended wife's reversionary interests (*In re Jackson's Will*, 1879, 13 Ch. D. 189).

The various senses in which the term "entitled" is used are exhaustively summed up in Stroud's *Jud. Dict.*

Entry—

Against Interest.—See DECLARATIONS OF DECEASED PERSONS.

By Deceased Persons.—See DECLARATIONS OF DECEASED PERSONS.

Forcible.—See FORCIBLE ENTRY.

On Benefice.—To enable a clerk to enter upon and take possession of a benefice, it is necessary for him first to obtain a presentation from the patron of the church. The next step is the examination by the ordinary of the capacities of the clerk.

Both these subjects are treated under the article PRESENTATION (*q.v.*). If the ordinary is satisfied with the fitness of the clerk presented, he admits him as a fit person, and then proceeds personally or by his chancellor or vicar-general to institute him (as to institution, see articles ADVOWSON and PRESENTATION), of which the effect is to make the presentee responsible for the cure of souls in the benefice. After institution, the clerk has a *jus ad rem*, and can enter on the glebe and take the tithes; but should they be withheld from him, he cannot sue for them. In cases where the bishop is himself patron of the living, he is said to collate, and not to institute, and in such cases there is, strictly speaking, no presentation or admission, for the bishop cannot present to himself. As to collation, see article PRESENTATION. After institution or collation the ordinary issues a mandate for the induction of the clerk to the person who has power to induct, and who at common law is the archdeacon. As to induction, see article PRESENTATION. The effect of induction is to give to the clerk a *jus in re* to the temporalities, so that he can now sue for the tithes if they are withheld from him; and it is thus equivalent to livery of seisin. Under the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122, s. 7), every person instituted or collated to any benefice with the cure of souls shall on the first Lord's day on which he officiates in the church of such benefice, or on such other Lord's day as the ordinary may appoint and allow, publicly read the Thirty-nine Articles and make the declaration of assent, adding after the words "Articles of religion" in the said declaration, "which I have now read before." If he fail to comply with the provisions of this section, he shall absolutely forfeit

his benefice; but no title to present by lapse shall accrue by any such forfeiture until the ordinary has given six months' notice thereof to the patron. At law, if not in equity, a parson claiming tithes in right of the church was bound to prove his institution, induction, and all things required to qualify him to be incumbent of the church, but if he had been in possession for some years, he was not, unless some reason was shown by the defendant why these things should be proved. On this subject further see Phillimore, *Ecc. Law*, 2nd ed., vol. i. p. 364.

As a parson may be called upon to prove these facts, it is practically desirable that he should be able to produce such a certificate of compliance as is given in Phillimore, *Ecc. Law*, 2nd ed., vol. i. p. 365, signed by persons who were present both at the induction and reading the articles.

A perpetual curate enters upon his benefice by licence from the bishop without institution or induction.

Right of.—See LANDLORD AND TENANT.

[*Authorities.*—Johnson, *Parsons' Vade Mecum*; Digges, *Parsons' Counsellor*; Phillimore, *Ecc. Law*, 2nd ed.; Cripps, *Law of the Church and Clergy*. See also articles herein, ADVOWSON; INCUMBENT; PRESENTATION.]

En ventre sa mère.—The law applying to an unborn child has remained unchanged in principle since the days of Coke, who says (*Earl of Bedford's case*, 28 & 29 Eliz. vol. iv., Pt. 7, Rep. p. 67, 8 b) that "although *filius in utero matris est pars rascrum matris*, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth." A child *en v. sa m.* is deemed to be already born for some, but not for all, purposes. It cannot be the subject of murder, if death happens while the child still remains in the womb; but if the child, after its birth, die of injuries which it sustained *en v. sa m.*, the perpetrator may be guilty of murder (*R. v. J. Senior*, 1832, 1 Moo. C. C. 346; *R. v. West*, 1848, 2 Car. & Kir. 784). The procuring of abortion is, in many cases, a crime. Proceedings in Bastardy may be begun before a child's birth (see AFFILIATION). In capital cases the Court is bound to grant a reprieve when the convict is pregnant (see MATRONS, JURY OF). The extent to which, for many purposes, a child *en v. sa m.* is recognised as a person *in rerum natura* is in matters other than criminal very great. Buller, J., said that it might be considered "as generally in existence" and "entitled to all the privileges of other persons," and, though described as a nonentity, able in law to be and to do many things, which the judge enumerates (*Thelluson v. Woodford*, 1798, 4 Ves. 335). In *Walker v. Gl. N. Ry. Co. of Ireland*, 1891, 28 L. R. Ir. Q. B. & Ex. D. p. 69, the lore of the subject is collected and discussed. A child *en v. sa m.* might be an executor (*Bac. Abr.* "Executors" [A.], s. 70); may take under the Statutes of Distributions; may take by devise; is a "child" in the construction of wills, and within the meaning of Lord Campbell's Act (see CAMPBELL'S (LORD) ACT (ACCIDENTS) (9 & 10 Vict. c. 93); see *The George & Richard*, 1871, L. R. 3 Ad. & Ec. 466); may have an injunction against waste; this is not an exhaustive list; the cases cited or to be cited give more illustrations. "The general rule," Lord Hardwicke says (*Burnett v. Mann*, 1748, 1 Ves. 156), "is that they (unborn children) are considered *in esse* for their benefit, not for their prejudice"; a rule restated by Lord Westbury (*Blosson v. Blosson*, 1864, De G., J. & S. 665), and therein called "a fiction or indulgence of the law"; which is not, however, without limit (see as to rents accumulated due before a posthumous child's birth, *Richards v. Richards*, 1860, Johnson, 754, at pp. 762, 763). See POSTHUMOUS CHILD.

The Irish case (*Walker v. Gt. N. Ry. Co.*, *supra cit.*) decided against a claim for damages on the ground of injury sustained by a child *en v. sa m.*, but the decision turned rather upon a question of the actual contract than upon any principle of tort (see Beven's *Negligence*, 2nd ed., pp. 84-86, p. 250).

The books (*e.g.* Fleta) speak of a writ *de ventre inspiciendo*, which could be obtained from the Chancery to prevent the fraud of a supposititious child; the procedure, copied from the civil law, appears to be obsolete.

[*Authorities.*—Fleta; Wharton's *Law Dictionary* (*de vent. inspi.*); Blunt's *Ambler's Rep.* 711; Spence, *Eq. Jur.* i. p. 617, & ii. cap. 5; Williams' *Saund.* vol. ii. pp. 779, 780; Tudor's *L.C. (Real Prop.)*, Notes to *Viner v. Francis*, pp. 798 foll.; Cruise's *Digest*, vol. iii. tit. 29, "Descent," cap. 3, s. 11, & vol. vi. tit. 38, pp. 14, 15; Daniell, *Ch. Pr.* p. 105; Coke, 3 *Inst.* p. 50; Black. v. i. 116; Russ. on *Crimes*, iii. 6, 7, 122, 218-222.

Epidemic.—By several statutes the Local Government Board is empowered to frame and issue regulations to sanitary authorities prescribing the measures to be taken in the event of the outbreak of any epidemic, endemic, or infectious disease. Regulations may be made (*a*) dealing with the speedy interment of the dead, (*b*) for house-to-house visitation, (*c*) for the provision of medical aid and hospital accommodation, and (*d*) for the promotion of cleansing, ventilation, and disinfection (Public Health Act, 1875, ss. 130, 134; Public Health (London) Act, 1891, s. 82; and Epidemic and other Diseases Prevention Act, 1883, s. 2). The duty of enforcing these regulations is cast upon the sanitary authorities of the districts affected (Act of 1875, s. 136), who are given powers of entry upon any premises or vessel for the purpose of carrying out the regulations (s. 137). For efficiently executing the requirements of the regulations, sanitary authorities are authorised to borrow money from the Public Works Loan Commissioners, and certain formalities in connection with same may in urgent cases be dispensed with if the Local Government Board deems it advisable (Epidemic, etc., Act, 1883, s. 2).

Further powers were conferred upon the Local Government Board by the Public Health Act, 1896, by the provisions of which the Board's regulations made under the Public Health Act, 1875, may be enforced and executed by officers of customs, officers and men of the coastguard, as well as by other authorities and officers; in particular, the regulations may provide for signals being made by infected vessels, for questions to masters, for the detention of affected vessels or persons on board the same, and as to the duties to be performed in cases of such diseases by masters, pilots, and other persons on board vessels (s. 1). Penalties are imposed by this Act as well as by the Act of 1875 for obstructing the execution of the regulations.

Various regulations have been issued from time to time by the Local Government Board under these statutory powers; the most recent are those issued on 9th November 1896 relating to cholera, yellow fever, and plague (see Statutory Rules and Orders, 1896, p. 440).

See DISEASE; HOSPITALS; PUBLIC HEALTH.

Epilepsy.—The criminal responsibility of epileptics is governed by the same principles as that of insane persons. See article LUNACY.

Episcopal and Capitular Estates.—See ECCLESIASTICAL COMMISSIONERS.

Equal; Equally.—By a devise or bequest to several persons “equally amongst them” or “equally,” a tenancy in common (*q.v.*) is created, unless this construction is inconsistent with the context (2 *Jarm. Wills*, 5th ed., pp. 1122 *et seq.*, where the cases are collected and discussed).

Equality of States.—In their intercourse with each other all States are equals. Whatever is lawful for one country is lawful for another, and what is unjustifiable in one is unjustifiable in another. In the ceremonial between States, in official interviews and correspondence, at sea and in war, this equality is regarded as an essential attribute of national independence.

Any right of revision by one State of the international treaties concluded by another State places the latter in a position of dependence, and its right to treatment as an equal ceases. See, on the other hand, BLOCKADE (*París*); CONCERT, EUROPEAN; EMBARGO; REPRISALS; RETORSION.

[*Authorities.*—Heffter, *Droit Inter. Public*, trans. by M. Bergson, Paris, 1866; Klüber, *Droit des Gens*, edited by M. Ott, Paris, 1861; Vattel, *Law of Nations*, London, 1797; Twiss, *Law of Nations in Time of Peace*, Oxford, 1884.]

Equerry.—Equerries (French, *écuyer*, a stable) are officers in the department of the Master of the Horse in the Royal Household, the chief of these being Crown equerry and secretary to that officer. There are others, called equerries in ordinary; and to these offices and that of the Crown equerry salaries are attached. There are extra equerries and honorary equerries, who receive no salary. The Crown equerry changes with changes in the ministries: the office of Master of the Horse being political. The duties of the equerries are taken in rotation; and when the Sovereign rides abroad in state an equerry goes in the leading coach.

The households of the Royal princes and princesses have officers of the same denomination attached to them, but salaries on their account are not charged upon the Civil List (see LIST (CIVIL)) as those of the Sovereign's equerries are.

Equitable—

Assignment.—The subject of the assignment of choses in action generally is dealt with in vol. i. p. 358; the present article is intended only to deal with two points having special relation to equitable assignments of choses in action, viz. notice and the procedure by which the assignee may recover the property assigned.

A. Notice.—1. *The rule in Dearle v. Hall* (1823, 3 Russ. 1; 27 R. R. 1; see vol. i. p. 360 (5)): If a second equitable assignee of a chose in action, who had no notice (*In re Holmes*, 1885, 29 Ch. D. 786) at the date of the assignment to him (*Mutual Life Assurance Society v. Langley*, 1886, 32 Ch. D. 460) of the earlier equitable assignment, gives notice of his assignment to the trustee or debtor of the fund or debt assigned before the trustee or debtor has received notice of the earlier assignment, he thereby obtains

priority, although later in point of time. See generally *Stephens v. Green*, [1895] 2 Ch. 148; *In re Wyatt*, [1892] 1 Ch. 188, aff. as *Ward v. Duncombe*, [1893] App. Cas. 369.

The object of the rule is to compel an assignee to give notice, in order that anyone who deals with the assignor may be able to find out by inquiry of the trustee or debtor what is the interest of the assignor (*loc.*). It is a trustee's duty to answer inquiries as to notices of encumbrances which come from the beneficiaries (*Low v. Bouverie*, [1891] 3 Ch. 82; *In re Tillott*, [1892] 1 Ch. 86), but not if they come from strangers (*loc.*, *In re Dartnall*, [1895] 1 Ch. 474). It is not his duty (apparently) to pass on such notices to his successors (see *Phipps v. Lovegrove*, 1873, L. R. 1 Eq. 80, cited below). Questions of priority depending upon notice, and of sufficiency of notice, all turn upon these considerations. The authorities will be found stated at length in the notes to *Ellison v. Ellison*; White and Tudor, *L. C.*, 7th ed.; or to *Ryall v. Rowles*, in the earlier editions. A few points only can be noticed here.

2. *The rule applies only in favour of assignees for valuable consideration*, and accordingly a trustee in bankruptcy or an execution creditor cannot obtain priority by giving notice (*Gorrings v. Irwell, etc.*, *Works*, 1886, 34 Ch. D. 128; *Davis v. Freethy*, 1890, 24 Q. B. D. 519; *In re Patrick*, [1891] 1 Ch. 82). But failure to give notice may cause a debt accruing due in the course of a bankrupt's trade to fall under the order and disposition clause in bankruptcy (vol. i. p. 360; *Ryall v. Rowles*, 1747, 1 Ves. 348). The rule does not apply to interests in land, but does apply to money secured upon, or to arise from the sale of, land (*Lee v. Howlett*, 1839, 2 Kay & J. 531; *Arden v. Arden*, 1885, 29 Ch. D. 702). It probably does not apply to assignments of shares in a company which is precluded from receiving notice of equitable interests in its shares (per Lord Selborne, *Société Générale de Paris v. Walker*, 1884, 11 App. Cas. 20; but see *Bradford Banking Co. v. Briggs*, 1886, 12 App. Cas. 29). Such a company cannot itself acquire a lien in priority to an assignment of which, in fact, its officers have notice (*loc.*). To obtain priority an equitable assignee of shares must be registered as a shareholder, or, at anyrate, be in a position to be so registered forthwith (*Moore v. North-Western Bank*, [1891] 2 Ch. 599).

3. *Notice is sufficient to preserve priority against subsequent assignees if the trustees have such information as a reasonable business man would act upon whence-soever it comes* (*Lloyd v. Banks*, 1868, L. R. 3 Ch. 488). The converse does not hold. In order to obtain priority by giving the first notice, a second assignee, himself, or someone on his behalf, must give the notice (*Arden v. Arden*, 1885, 29 Ch. D. 702). It need not be in writing (*Ex parte Agra Bank*, 1868, L. R. 3 Ch. 555; see next case). It may be given to an agent, e.g. a solicitor acting for the trustee or debtor in the matter (see *Saffron Walden, etc., Building Society v. Rayner*, 1880, 14 Ch. D. 406). It must be given to the trustees under whom the assignor claims, not to trustees of an earlier settlement under which they may claim (*Stephens v. Green*, [1895] 2 Ch. 148). If given to one of several trustees or joint debtors it is effective to preserve priority (*Meux v. Bell*, 1841, 1 Hare, 73; *Willes v. Greenhill*, 1861, 31 L. J. Ch. 1), and to obtain it, so long as the trustee or debtor receiving the notice retains his position. The priority over an earlier assignee acquired by notice is lost on a change of trustees, unless the notice is, in fact, communicated to their successors (*Phipps v. Lovegrove*, 1873, L. R. 16 Eq. 80; *Hallows v. Lloyd*, 1888, 39 Ch. D. 686). But if a first mortgagee has duly given notice to a trustee before the date of a second mortgage, and has thereby preserved the priority due to his earlier title, he does not lose it by the death of the trustee after the second mortgage is effected. This is

because at the time of the second mortgage the second mortgagee might by inquiry have ascertained the existence of the first (*In re Wyatt*, [1892] 1 Ch. 188; [1893] App. Cas. 369).

Notice must be given after the right assigned, e.g. the debt, has come into existence (*Johnstone v. Cur*, 1881, L. R. 19 Ch. D. 17; *Western Waggon, etc., Co. v. West*, [1892] 1 Ch. 271). It is of no importance whether the right is vested, reversionary, or contingent (*Ryall v. Rowles*, *supra*; *Brice v. Bannister*, 1878, L. R. 3 Q. B. D. 569).

Notices are taken to be delivered in the order in which they would be received according to the ordinary course, e.g. of the post (*Calisher v. Forbes*, 1869, L. R. 7 Ch. 109).

In the case of a fund in Court, a stop order is the equivalent of notice to trustees respecting a fund in their possession (vol. i. p. 361; *In re Holmes*, 1885, 29 Ch. D. 786; *Stephens v. Green*, [1895] 2 Ch. 148).

B. Procedure.—The assignee of a legal chose in action, e.g. a debt, if the assignment complies with the requirements of the Judicature Act, 1873, s. 25 (6), can sue the debtor, etc., in his own name (vol. i. p. 354), so also can the assignee of an equitable chose in action, since he could, and must, have proceeded in equity before the Judicature Acts (see the notes to *Ellison v. Ellison* in White and Tudor's *L. C.*, 7th ed.; notes to *Ryall v. Rowles* in earlier editions; and the note to Judicature Act, 1873, s. 25 (6), in the *Annual Practice*). If the chose in action is a legal right, and the above-mentioned requirements are not complied with, there is some doubt as to what course the consignee should pursue. Order 16, r. 11, provides that no action shall be defeated for mis-joinder or non-joinder of parties, but this does not avoid the difficulty, since, if the plaintiff has no right to sue, the defect cannot (probably) be cured by amendment (see and cp. *Walcott v. Lyons*, 1885, 29 Ch. D. 584, and *Ayscough v. Bullar*, 1889, 41 Ch. D. 341). There are three possible courses.

1. The assignee may sue in his own name, the assignor being no party to the action. In *Van Gelder v. Sowerby, etc., Society*, 1890, 44 Ch. D. 374, the mortgagor of a patent was held to be entitled to sue alone for infringements. It is, however, submitted that the objection that the assignee cannot give a discharge is, as the law stands, an unanswerable objection to this course (*King v. Victoria Insurance Co.*, [1896] App. Cas. at p. 256). Before the Judicature Acts the assignee could not have sued as suggested even in equity (*Partington v. Bailey*, 1836, 6 L. J. Eq. 179).

2. He may sue in his own name, adding the assignor as a defendant. The action in this form would clearly be maintainable (cp. *Luke v. The South Kensington Hotel Co.*, 1879, 11 Ch. D. 121), but the assignee might have to pay the assignor's costs unless the latter had refused, on the offer of a proper indemnity against the costs of the action, to allow his, the assignor's name to be used as plaintiff (see below). Before the Judicature Acts a bill in this form could not have been maintained in equity in a simple case unless the assignor had prevented the assignee from using his name at law (*Hammond v. Messenger*, 1838, 7 L. J. Ch. 310). And since the Acts a *cestui-que trust* is not entitled to sue in respect of the trust fund in his own name, unless there are special circumstances such as the inability of the trustee to sue (*Benningfield v. Baxter*, 1886, 12 App. Cas. at p. 178), which make it necessary to allow this to be done (*Sharpe v. San-Paulo Rwy. Co.*, 1873, L. R. 8 Ch. at p. 610; *Meldrum v. Scorer*, 1887, 56 L. T. 471). In such an action the Court would not join the assignor as a party without his consent (*Turquand v. Fearon*, 1879, L. R. 4 Q. B. 280) and that of the plaintiff (*Sanders v. Peek*, 1884, 32 W. R. 462).

3. Or the assignee may sue in the name of the assignor. It is submitted that this is the proper course in all cases (see notes in White and Tudor, *L. C.*, *ubi supra*). If the assignor consents, there can be no question. If he would not, a Court of common law would not formerly have stayed such an action at his instance, where he had been offered a proper indemnity against costs (*Spicer v. Todd*, 1831, 1 Dowl. P. C. 306; *Lewis v. Bott*, 1847, 16 L. J. Ex. 278; Dicey on *Parties*, pp. 68, 69, 71; Archbold's *Practice*, 14th ed., p. 373), or was not entitled to be indemnified, as where a wife sued in her husband's name (*Chambers v. Donaldson*, 1808, 9 East, 471).

A *cestui-que trust* is entitled to use the name of his trustee on the terms stated (*Auster v. Holland*, 1846, 3 Dow. & L. 740; *Fletcher v. Fletcher*, 1844, 4 Hare, at p. 78).

[*Authorities*.—See generally White and Tudor's *L. C.*, *ubi cit.*; Fisher on *Mortgages*, 4th ed., p. 88; Robbins on *Mortgages*, p. 1494; Story's *Equity*, Eng. ed., ch. 27; and Leake on *Contracts*, 3rd ed., p. 1005.]

Charge.—An equitable charge is such a charge on property as before the Judicature Act, 1873, would have been enforceable in a Court of equity only. An equitable charge does not imply a personal debt, but gives a right of realisation by judicial process, or, in some cases, by power of distress (Coote, *Mortgages*, p. 336, 5th ed.). An equitable charge is included in the expression "mortgage" as defined in the Conveyancing Act, 1881 (see s. 2 (vi.)), and is accordingly within the provisions contained in that Act (see s. 15) under which a transfer of a mortgage instead of a reconveyance can be required by a mortgagor who is entitled to redeem.

An equitable mortgage or charge may be created—(1) by mortgage of the equity of redemption subject to a prior legal mortgage; (2) by a written agreement to execute a mortgage of specified property, or (3) to deposit the title-deeds; (4) by deposit of title-deeds, with or without a memorandum of charge, with intent to create a security thereon. In the case of registered land a deposit of the land certificate is equivalent to a deposit of the title-deeds (see Land Transfer Act, 1897, s. 8 (4)).

A mere covenant or agreement to give a security by mortgage, or to settle lands of a certain value, or within a certain time, does not amount to an equitable charge (Fisher, *Mortgages*, pp. 85, 86, 4th ed.).

An equitable mortgagee by deposit of deeds, with or without a memorandum of charge, is entitled to foreclosure (*James v. James*, 1873, L. R. 16 Eq. 153; *Backhouse v. Charlton*, 1878, 8 Ch. D. 444). An equitable mortgagee may obtain a receiver.

The lien of a vendor for unpaid purchase money, or of a purchaser for deposit or purchase money paid, where the contract fails through no default on his part, a lien created by a covenant to settle specified property, and other similar liens, are in the nature of equitable mortgages, and effect will be given to them in equity (see notes in 2 Seton, pp. 1709–12, 5th ed.).

See also EQUITABLE Assignment and MORTGAGE; and as to registration of an equitable charge under the Registry Acts, see LAND CHARGES and REGISTRY.

Claim.—An equitable claim is such a claim as before the Judicature Act, 1873, would have been properly cognisable by a Court of equity only. Since the Act, law and equity are administered by the Supreme Court according to the rules laid down in the Act, by which if a plaintiff or petitioner claims any equitable estate or right, or equitable relief,

which theretofore could only have been given by a Court of equity, the Court is to give the same relief as the Court of Chancery would have given in a suit or proceeding properly instituted before the Act; and effect is to be given in like manner to equitable claims or defences on the part of a defendant, whether raised by defence or counterclaim; and equities appearing incidentally in the cause or matter are to be recognised in the same manner in which the Court of Chancery would have recognised the same before the Act; so that there may be a final determination of all matters in controversy in the proceeding between the parties, and multiplicity of legal proceedings avoided (see *J. A.*, 1873, s. 24 (1) (2) (3) (4) (7)).

Defences.—Under sec. 24 (2) of the Judicature Act, 1873, the High Court and the Court of Appeal have power to give effect to “equitable defences,” and the Queen’s Bench Division in doing so will follow the equitable practice as nearly as it can (*Walmsley v. Mundy*, 1884, 13 Q. B. D. 807), and are required (*ibid.* subs. (4)) to recognise and take notice of all such defences appearing incidentally in the course of any cause or matter. As to pleading equitable defences in actions for the recovery of land, see *R. S. C.* 1883, Order 21, r. 21 (*n.*), and RECOVERY OF LAND. See also CONFLICT OF LAW AND EQUITY; and as to notice of equitable defences in the County Court, article COUNTY COURTS, vol. iii. p. 536.

Estates and Interests.—Before the coming into operation of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the above phrase was commonly used to describe all those rights of ownership over, or in relation to, lands or hereditaments, or other specific claims, whether subsisting by way of lien or charge, or subsisting as a right to compel a conveyance by the person having the legal estate, which were enforceable under the separate jurisdiction of the Courts of equity, but which, in the Courts of common law, were either not enforceable, or, if enforced, were enforced only as contracts giving a right to damages for a breach, not as giving any specific claim to, or over, the lands or hereditaments affected by them. Sec. 24 of the above-mentioned Act in effect enacted, that in future the Courts constituted by the Act, which embraced the previously existing Courts, both of law and equity, should give to all equitable estates, rights, titles, and claims, the same effect which would have been given thereto by the Court of Chancery before the passing of the Act. Since the coming into operation of the Act, equitable estates and interests have therefore been equally enforceable with legal estates and interests, and in the same *forum*; and it follows that, in this sense and to this extent, being enforceable in the Courts of law, they might now be styled legal estates and interests. But inasmuch as the equitable rules which were previously applicable to equitable estates and interests differ in some respects widely from the legal rules applicable to legal estates and interests, and inasmuch as the equitable rules, though now enforceable in the legal *forum*, remain unchanged in their general application, it follows that the separate designation of equitable estates and interests is rightly retained in practice.

Equitable estates and interests may be divided into several classes, as follows:—

1. Equitable estates, properly so called, which are formal limitations of the use, in such a shape as to be outside the scope of the Statute of Uses, therefore taking effect as trusts. These estates are strictly analogous to,

and conterminous in duration with, the legal estates to which they correspond, and which would arise at law on similar limitations, whether made under the rules of the common law, or under limitations of the use capable of being executed by the statute. They comprise estates *pur autre vie*, estates for life, estates tail, whether general or special, and estates of fee-simple; and they include the limitation of those estates by way of contingent remainder. The legal rules relating to the limitation of estates, so far as regards the construction of them, and the necessity for proper words of limitation to define the estate, are applicable to these equitable limitations (*Meyler v. Meyler*, 1883, 11 L. R. Ir. 522; *In re Whiston's Settlement*, *Lovatt v. Williamson*, [1894] 1 Ch. 661; *Earl of Mountcashel v. More-Smyth*, [1896] App. Cas. 158). They were not liable to legal rules other than those relating to the limitation of estates. An equitable contingent remainder, created before the coming into operation of 40 & 41 Vict. c. 33, was not liable to fail by reason of the determination of the preceding particular estate, equivalent in duration to a freehold, before the vesting of the remainder; but equitable contingent remainders were undoubtedly subject to the rule against remoteness, so far as regards the ascertainment of the time within which they must necessarily vest, if they should vest at all (*Fearne, Cont. Rem.* 304, 305; *ibid.* 321; *Berry v. Berry*, 1878, 7 Ch. D. 657; *Abbiss v. Burney*, 1881, 17 Ch. D. 211, at p. 229; *Marshall v. Gingall*, 1882, 21 Ch. D. 790). It is the better opinion, notwithstanding *In re Frost*, *Frost v. Frost*, 1890, 43 Ch. D. 246, that legal contingent remainders at the common law are not subject to the last-mentioned rule.

2. Limitations by devise, or by way of springing or shifting use, not capable of being executed by the statute, and therefore taking effect as trusts. They are in all respects analogous to, and conterminous with, the legal limitations, unknown to the common law, but recognised by the Courts of law under the Statutes of Wills and the Statute of Uses, known as executory devises and other executory limitations. Such equitable limitations are subject to the legal rules, so far as regards construction and the necessity for proper words of limitation.

3. Equities of redemption subsisting upon mortgages, when the estate of the mortgagee had become absolute at law. These peculiar rights, which differ widely from the equitable estates hitherto considered, though they are often confused with them, do not require any words of limitation, in their inception, to define their extent; inasmuch as, by the well-known rule, the indentment of equity, even without the insertion of any express proviso for redemption, casts upon the mortgagor an equitable right having the same extent as his legal estate prior to the mortgage; except that, in general, a tenant in tail, who had barred the estate tail by common recovery, took an estate in fee-simple by way of equity of redemption; and now, by the Fines and Recoveries Act, 1833 (3 & 4 Will. iv. c. 74, s. 21), an absolute bar of an entail effected for the purpose of a mortgage, operates as a permanent bar of the entail, notwithstanding the expression of a contrary intention. An equity of redemption, so soon as it has come into existence, and while subsisting as such, descends in the same manner, and can be conveyed by the same assurances, and for estates, or, rather, interests, of the same duration, as if it had been a legal estate of the like quantum vested in the mortgagor. But a contingent remainder, derived out of an equity of redemption in fee, was not, before 40 & 41 Vict. c. 33, liable to destruction by the premature determination of the particular estate; and was subject, as regards the time of its vesting, to the rule against perpetuities (*Astley v. Micklethwait*, 1880, 15 Ch. D. 59).

4. Lastly, we come to what may be called nondescript equities, consisting in a right, under certain circumstances, or upon the happening of a contingency, or the performance of a condition, to demand a conveyance of the legal estate from the person in whom it is vested: such as arise in wills, upon a devise to trustees, with directions to convey in a specified manner at a future time, or upon an option to purchase at a future date, or on performance of a condition, or on the failure of a trust for conversion, or upon the election of a beneficiary under a trust for conversion on his becoming absolutely entitled and electing to take the property *in specie*. It must suffice here to indicate in outline the nature of this somewhat wide and vague class of equities, which, like equities of redemption, to which they bear much resemblance, are often confused with equitable estates, properly so called, without attempting any detailed examination. With regard to the conveyance, as distinguished from the origin, of equitable estates and interests, it is conceived that the following rule, which was laid down in 1895 by North, J., in an unreported case, represents the law: Every assurance of any equitable estate or interest *in esse*, however arising, which is intended to pass an interest of the *quantum* of a fee, must, if made by deed, contain such words of limitation as, at law, would be sufficient for the limitation of a legal fee. And, in general, it is conceived that all assurances of existing equitable interests, by whatever instrument made, must contain such words of limitation as would be necessary at law, in an instrument of the like nature, to give effect to the intention.

Execution.—See EXECUTION.

Lien.—See LIEN.

Mortgage.—See MORTGAGE.

Owner.—See EQUITABLE Estates and Interests; ESTATES; MORTGAGE.

Plea.—See EQUITABLE Claim; EQUITABLE Defences.

Relief.—See such headings as SPECIFIC PERFORMANCE.

Set-off.—See SET-OFF.

Waste.—See CONFLICT OF LAW AND EQUITY and WASTE.

Equity.—The word “equity” is used by lawyers and legal writers in various senses (see Austin’s *Jurisprudence*, ch. xxxiii.; Story’s *Equity Jurisprudence*, ch. i.; *Co. Lit.* 24 b; and EQUITY OF A STATUTE). Of these by far the most important is its meaning as the name of what Austin proposed to call “Chancery Law,” and what can only be defined as that portion of remedial justice which was formerly exclusively administered by a Court of equity as contra-distinguished from that portion which was formerly exclusively administered by a Court of common law (Story, s. 25). It is with equity, in this sense, that the present article is concerned.

English equity was in many respects analogous to the *jus prætorium*. Both were designed to modify the rules of another and older system without recourse to direct legislation, and both became, in course of time, highly

organised and very extensive divisions of the law. There is, however, little warrant for the once current opinion that the rules of English equity were to any great extent adopted from the Roman law. The contents of the two systems have few resemblances which cannot be explained by the fact that they were alike supplementary systems, and alike the result of importations from current morality into the domain of law to meet the necessities of a highly civilised community. The conditions under which equity developed in England differed from those in operation at Rome in two material circumstances. The Chancellor did not announce beforehand the principles upon which he intended to act in modifying or supplementing the common law, as the Prator did at the beginning of his year of office. He could only deal with each particular case as it came before him. And English equity was administered in and by a separate Court, while the *jus pratorium* was administered concurrently with and by the same tribunals as the *jus civile*.

1. *History*.—The equitable jurisdiction of the Court of Chancery owed its origin to the petitions for redress of private grievances which were, in early times, addressed to the king or his council, in cases where the remedies provided by the common law were inadequate or unavailable. It was founded upon the judicial authority, forming part of the Royal prerogative, under which, so late as the reign of James I., the king still claimed power to intervene in matters of private right (see Maine, *Ancient Law*, ch. iii., *Early Law and Custom*, p. 190). In the fourteenth century it became the regular course to refer these petitions to the Chancellor, and soon afterwards the petitioners began to address themselves to him directly. The jurisdiction of the Chancellor sitting alone can be traced as far back as the reign of Richard II. (Dicey on the *Privy Council*; *The Selden Society's Select Cases in Chancery*, p. xviii.). He called the party complained of before him by the "writ of *subpœna*,"¹ and as the representative of the regal power from which the Courts of common law were themselves derived, made such order as he thought "justice and equity" demanded. The frequency of such applications to the Chancellor led to the institution of a regular Court. A definite system of procedure grew up, and a body of principles was adopted. Before the reign of Elizabeth the petition or bill of complaint, with its accompanying interrogatories, and the answers of the defendants to these, had already marked out the characteristic procedure of the modern Court of Chancery,—acting *in personam* and requiring the defendant to state his case on oath. From the earliest period of which a record remains much attention was paid to precedent where any could be found, and to the *cursus curiæ* (1 Spence 367; Kerly, p. 100). It was probably due chiefly to the absence alike of reports and of the formal writs of the common law, that the Court of Chancery remained so long open to the charge that "its decrees were rather in the nature of awards, formed on the sudden *pro re nata*, with more probity of intention than knowledge of the subject" (3 Black. Com. p. 433), and that it "varied as the length of the Chancellor's foot" (*Selden's Table Talk*). Under James I. the development of equity passed through a critical stage. Lord Ellesmere claimed the right to take away from a successful plaintiff at law the fruits of his judgment, by an injunction restraining him from pursuing it in cases where the judgment was deemed to be inequitable. This the judges, led by Coke, contested, but on a reference to the king, he decided the case in the Chancellor's

¹ This writ was commonly ascribed to John Waltham, a Master of the Rolls under Richard III. (Parl. Rolls, 3 Hen. v.; 1 Campbell's *Lives*, p. 296). It is really of older date (see 1 L. Q. R. 162, and *The Selden Society's Select Cases in Chancery*, Intro. p. xiv.).

favour (Cary's *Reports*, App.; Campbell's *Lives*, ii. p. 236; *Earl of Oxford's* case, 1616, 1 Ch. Rep. 1; White and Tudor's *L.C.*; see also Bacon's *Works*, ed. 1827, vii. p. 244, and 3 *Co. Inst.* p. 125), and the pre-eminence of equity was secured. From the time of Lord Nottingham (1673-1682) the development of equity as a definite and scientific system of law continued without break. Lord Nottingham treated it as already become such a system. And although it was called a Court of Conscience, he declared, "with such a conscience as is only *naturalis et interna* this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures" (*Cook v. Fountain*, 1676, 3 Swan, at p. 600). During the great Chancellorships of Hardwicke (1736-1756) and Eldon (1801-1827) "the system of our Courts of equity" became "a laboured connected system governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may perhaps be liable to objection" (3 Black. *Com.* p. 432; cp. Lord Eldon's statement in *Gee v. Pritchard*, 1818, 2 Swan, at p. 414). Modern equity made no pretence to find a remedy for every wrong for which the common law has not provided one (3 Black. *Com.* p. 430; cp. *Day v. Brownrigg*, 1878, 10 Ch. D. 294). But notwithstanding this, many of the rules of equity are of quite recent date. "We can name the chancellors who first invented them" (Jessel, M. R., *In re Hallett's Estate*, 1879, L. R. 13 Ch. D. at p. 710).

2. *Modern Equity*.—Before the Judicature Acts the jurisdiction of the Court of Chancery was divided into three branches,—its exclusive, concurrent, and auxiliary jurisdiction. The law of TRUSTS, MORTGAGES, married women's property (see HUSBAND AND WIFE), and the administration of estates (see EXECUTORS AND ADMINISTRATORS) are examples of the contents of the first division: the special equitable remedies, SPECIFIC PERFORMANCE of contracts, INJUNCTION to prevent a threatened wrong, and relief against PENALTIES are illustrations of the second; and the process of DISCOVERY in aid of an action at law is the principal example of the third. This division, which was based entirely upon the separation of Courts of equity and Courts of law, has now lost its meaning.

Speaking generally, the broad distinctions between substantive equity and the common law may be said to be—(1) that equity paid more attention to the intentions of parties to a transaction and less to the form into which the transaction itself was cast, and (2) that, for many purposes, it treated as done what had been agreed to be or ought to have been done. For example, the mortgaged estate was treated by it as the property of the borrower, the trust estate as the property of the beneficiary, a penalty as security only for the performance of the obligation to the breach of which it was annexed, an agreement to give a charge as equivalent to the charge itself (*In re Strand Music Hall Co.*, 1865, 14 W. R. 6), and an agreement for a lease as equivalent to a lease (*Walsh v. Lonsdale*, 1882, 21 Ch. D. 9), provided the tenant was entitled to enforce it (*Chetwynd v. Morgan*, 1886, 31 Ch. D. 596; cp. also the doctrines of CONVERSION and SATISFACTION). Except in regard to stipulations in contracts as to time (see *Tilley v. Thomas*, 1867, L. R. 3 Ch. 61, and TIME), there was no difference between the rules of construction of a statute or document at law and in equity (3 Black. *Com.* p. 430; *In re Terry & White's Contract*, 1886, 32 Ch. D. at pp. 21, 28; *Tilley v. Thomas*, *supra*; Beal on *Legal Interpretation*, p. 52).

3. *Maxims of Equity*.—It was at one time supposed that the doctrines of equity could be deduced from, or grouped around, a few elementary principles capable of summary statement in the form of maxims (see Francis,

Maxims of Equity, 1739). The attempt to do this was long ago found to be an idle one, but it may be useful to enumerate a few of the more general maxims, since they are still frequently quoted and referred to (see *MAXIMS OF EQUITY*; Story, ch. iii., and *Com. Dig.* tit. "Chancery").

Equity Acts "in personam."—It is not necessary, therefore, in order to ground its jurisdiction that the property involved in a suit should be situated in England (see the notes to *Penn v. Lord Baltimore* in *White and Tudor's L. C.*, and *Ewing v. Orr-Ewing*, 1883, 9 App. Cas. 34).

He that comes into Equity must do Equity.—For instance, if relief is given against an inequitable bargain, the consideration paid by the defendant must be returned (see *CATCHING BARGAINS*); and if in a redemption action the mortgage money is not paid, the mortgage will be foreclosed. So a husband seeking to recover his wife's property in equity was compelled to assign to her a share of it (*HUSBAND AND WIFE*). The maxim applies only to equities arising out of the matter in respect of which relief is sought (*United States v. M'Lea*, 1867, 37 L. J. Ch. 129; *Gibson v. Goldsmid*, 1854, 5 De G., M. & G. 757; *Hanson v. Keating*, 1844, 4 Harc. 1).

He that comes into Equity must have clean Hands.—The meaning of this is that where a claim is based upon an inequitable transaction, e.g. a fraud, it will not be enforced (*Com. Dig.* tit. "Chancery," ed. 1822, pp. 620, 621).

Vigilantibus non dormientibus aequitas subvenit (see *ACQUIESCENCE*).

Where Equities are equal the Law prevails (see *MORTGAGE, TACKING*; and *LEGAL ESTATE*).

Qui prior est tempore potior est jure.—"As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity" (per Kindersley, V.C., in *Rice v. Rice*, 1854, 2 Drew. at p. 78; see *MORTGAGE*).

Equality is Equity.—The principal application of this is to the case of joint owners, who are treated as owners in common in equity (see notes to *Lake v. Craddock* in *White and Tudor's L. C.*, and *JOINT TENANCY*).

4. *Equity under the Judicature Acts.*—The Judicature Act, 1873, provides that the Courts shall administer law and equity concurrently. So that if a party to an action claims any equitable estate or right, or relief on any equitable ground against any deed, instrument, or contract, or any right, title, or claim, or any relief founded upon a legal right which could, before the Act, have only been given in equity, the Court must give the same relief as the Court of Chancery ought to have given (s. 24), and it must give effect to all equitable titles, rights, duties, and liabilities appearing incidentally in the action (s. 24 (4)). And the Act, after dealing with a number of specific instances in which the rules of law and equity had been in conflict or at variance, provides generally that, in all such cases, the rules of equity shall prevail (s. 25).

The object of the Act was not to alter substantive rights, but only to simplify the procedure by which they were enforced. Under the system of distinct Courts, proceeding on distinct and in some cases antagonistic principles, it sometimes happened that parties in the course of the same litigation were driven backwards and forwards from Courts of law to Courts of equity, and from Courts of equity to Courts of law (*Chancery Commission Report*, 1852, pp. 1, 3). This was the evil to which the reform was addressed. "There was no fusion of law and equity, nor anything of the sort. It was vesting in one tribunal the administration of both in every case" (per Jessel, M. R., in *Salt v. Cooper*, 1880, 16 Ch. D. at p. 549). The equitable doctrine of part performance, for example, which affords an answer to a plea of the Statute of Frauds in a suit for

specific performance, does not enable the Court to give damages for breach of the contract, where it refuses specific performance, because the Court of Chancery would not have entertained a suit for such damages at all (*In re Northumberland Avenue Hotel Co.*, 1886, 33 Ch. D. 16; *Lavery v. Pursell*, 1888, 39 Ch. D. 508). It has nevertheless happened in many cases that the assimilation of jurisdictions has operated in practice to alter rights. Thus in an ejectment action a plaintiff can now get discovery from a purchaser for value without notice, although the Court of Chancery would have refused it (*In re Coope & Co. v. Emmerson*, 1887, 12 App. Cas. 300), and the discovery may enable him to recover the land where he would otherwise have failed. So a landlord can distrain upon a tenant holding under an agreement for a lease (*Walsh v. Lonsdale*, *supra*).

Actions to enforce rights which formerly fell under the exclusive jurisdiction of the Court of Chancery are assigned to the CHANCERY DIVISION.

[*Authorities*.—See the following writers on equity:—Story, Spence, J. W. Smith, H. A. Smith, and the various titles of this work dealing with equitable subjects. For the history of the equitable jurisdiction of the Court of Chancery, see Spence, Campbell's *Lives of the Lord Chancellors*, Sir Duffus Hardy's Introduction to the Close Rolls, *Select Cases in Chancery* (Selden Society), articles in the *Law Quarterly Review*, i. pp. 162, 443, and Kerly's *Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*.]

Equity, Courts of.—See CHANCELLOR; CHANCERY DIVISION; DURHAM; EQUITY; LANCASTER; SUPREME COURT; YORK.

Equity, Maxims of.—See EQUITY; MAXIMS OF EQUITY.

Equity of a Statute.—This expression is used in two senses.

1. In *Knight v. Farnaby*, 1706, 2 Salk. 670, it is used as meaning the principle or ground of a rule of law or equity adopted by analogy to a statute.

2. It is also used in some early cases as an equivalent for the "equitable construction" of a statute (*Russel v. Prat*, 1589, 1 Leon. 193). The theory in vogue in the seventeenth century and even later was that a remedial statute should receive an "equitable construction, on the strength whereof the Court of Equity was prepared to modify the language and extend the operation of a statute far beyond its exact words" (see *Income Tax Commissioners v. Pemsel*, [1891] App. Cas. 542, for the opinion of Lord Halsbury, L. C.). The most salient instances of this mode of construction are those of the Statute of Limitations, 1623, and the Statute of Frauds (*Britain v. Rossiter*, 1883, 11 Q. B. D. 123; *Alderson v. Mauldison*, 1883, 8 App. Cas. 467; but many other examples are collected in Maxwell on *Statutes*, 2nd ed., 354–362).

In the eighteenth century the words equitable construction were explained as meaning in accordance with the intention of Parliament (*R. v. Williams*, 1746, 1 Black. W. 93; 1 Burr. 402).

In this century the notion of construing statutes by equity or otherwise than according to the fair and obvious meaning of the words used has been discredited, and with the fusion of law and equity has been abandoned.

except in the case of statutes *in pari materia* with those which have already received an equitable construction not plainly excluded by the later Act (Maxwell, *l.c.* 363).

[*Authorities.*—Dwarris on *Statutes*, 617; Maxwell on *Statutes*, 3rd ed., 354–364; Wilberforce on *Statutes*, 238–242; Hardcastle on *Statutes*, 2nd ed., 86–88, 320–330.]

Equity of Redemption.—See FORECLOSURE; MORTGAGE.

Equity to a Settlement.—See HUSBAND AND WIFE.

Erasures.—See WILLS.

Erect; Erected; Erection.—For the legal signification of these terms, see *Philpott v. St. George's Hospital*, 1858, 6 H. L. 338; *Chamberlayne v. Brockett*, 1873, L. R. 8 Ch. 206; and Stroud, *Jud. Dict.* See further, the article LONDON (COUNTY), *Buildings*

Error.—See CONDITIONS OF SALE, vol. iii. p. 258; CONTRACT, *Mistake*, *ibid.* p. 343.

Error, Clerical.—See CLERICAL ERROR.

Error, Writ of.—A writ of error was formerly the principal mode of redressing erroneous judgments in the various Courts of record, whether superior Courts or inferior Courts, and whether exercising a civil or criminal jurisdiction.

Before the Judicature Acts error in law lay from inferior Courts of record, in the first instance, to the Queen's Bench, and from the superior Courts of law at Westminster to the Court of Exchequer Chamber, and thence to the House of Lords.

The writ of error with respect to civil causes in the superior Courts was taken away by the C. L. P. Act, 1852, s. 148, and error was made a step in the cause. The Act did not apply to criminal cases (*R. v. Seal*, 1855, 5 El. & Bl. 1), nor to the inferior Courts. By Order 58, r. 1 of R. S. C. 1875 (now repealed), bills of exceptions and proceedings in error were abolished; this did not apply to criminal proceedings (R. S. C. 1875, Order 62). No bill of exceptions, however, lay in any criminal case (see Archbold's *Crim. Cases*, 21st ed., p. 184). Whether the abolition applies to inferior Courts of civil jurisdiction is not so obvious, as no express mention is made of them; but it would seem that it does (see *Le Blanch v. Reuter's Telegraph Co.*, 1876, 1 Ex. D. 408 C. A.), and that appeals from such of those Courts as error lay from to the Queen's Bench come within the purview of sec. 45 of the Judicature Act, 1873, and that the Divisional Courts for hearing appeals from inferior Courts are now the proper tribunals for hearing such by way of appeal in the manner provided by R. S. C. Order 59, rr. 9–18 (see APPEALS IV. to *Divisional Courts*);

but they will be limited to the matters which could formerly have been raised upon a writ of error, viz. some error in law apparent on the face of the record, not aided at common law (see *AID BY VERDICT*) or by the statutes of *Jeofails* (*q.v.*) and amendment. There were some inferior Courts from which a writ of error did not lie, *e.g.* the Sheriffs' Court in the City of London or a Manorial Court (see *R. v. Old Hall*, 1869, L. R. 2 P. & D. 515), and some others not now important to mention. (For the law and practice as to error from inferior Courts before the Judicature Acts, see Archbold's *Practice of the Q. B., C. P., and Exch. Divisions of the High Court*, 13th ed., ch. cx. s. 5; and for the law as to error generally, the note to *Jaques v. Cesar*, Wms. Saun. 101). The remedy for errors in a Court not of record was by writ of false judgment (*q.v.*).

The Statutes 19 Geo. III. c. 70, s. 5, and 7 & 8 Geo. IV. c. 71, s. 6, make provision for a stay of execution upon a writ of error from an inferior Court of record where the damages are under £20 by recognisance in double the sum adjudged to be recovered.

Error from the Mayor's Court of London under the M. C. L. P. Act, 1857, 20 & 21 Vict. c. clvii. s. 4, which formerly lay to the Court of Exchequer Chamber, now lies to the Court of Appeal (Jud. Act, 1873, s. 18, subs. iv.), not in the mode provided by the Act, but by notice of appeal as regulated by R. S. C. Order 58 (see *Le Blanch v. Reuter's Telegraph Co.*, *supra*; *Pryor v. City Offices Co.*, 1883, 10 Q. B. 504; and *Candy's Mayor's Court Practice*).

Error in Criminal Cases.—By sec. 19 of the Judicature Act, 1875, subject to any rules of Court to be made under that Act, the practice and procedure in all criminal cases in the High Court and Court of Appeal are to remain as before; they were excepted from the Rules of the Supreme Court of 1875; they are also excepted from the present ones of 1883, and are now governed by the Crown Office Rules, 1886.

The writ lies for every substantial defect appearing on the face of the record, for which an indictment might have been quashed, or which would have been fatal on demurrer or in arrest of judgment provided such defect is not cured by verdict, and no question of law has been reserved under 11 & 12 Vict. c. 78. Objections on account of formal defects must be taken before the jury are sworn (14 & 15 Vict. c. 100, s. 25), and mere trivial defects are cured by the verdict (7 Geo. IV. c. 64, ss. 20, 21) (see *AMENDMENT IN CRIMINAL PROCEEDINGS*).

At common law some defective averments are cured by verdict if it appears to the Court that the verdict could not have been found on the issue without proof of the averment (*Heyman v. R.*, 1873, L. R. 8 Q. B. 102; and see *R. v. Goldsmith*, 1873, L. R. 2 C. C. R. 74). The total omission of a necessary averment would be fatal on error (*R. v. Aspinall and Others*, 1876, 2 Q. B. D. 48). So would the omission of the actual words of a libel (*Bradlaugh and Another v. R.*, 1878, 3 Q. B. D. 607 C. A.; but the law has been changed as to obscene libels, 51 & 52 Vict. c. 64, s. 7).

If upon an indictment for murder a man be convicted of manslaughter as an accessory after the fact, the judgment will be reversed on error (*Richards v. R.*, 1897, 13 T. L. R. 254); or if one be tried and convicted at the Quarter Sessions for an offence not cognisable there (*R. v. Balestraw*, 1696, 3 Salk. 188; and see further the cases referred to in Archbold's *Criminal Cases*, 21st ed., pp. 217-220).

A writ of error is the only remedy where a judgment has been given upon a demurrer to an indictment, as the Court for Crown Cases Reserved has no jurisdiction in such cases (*R. v. Fudermann*, 1850, 19 L. J. M. C.

147). It also lies to reverse an outlawry (*q.v.*) (*R. v. Wilkes*, 4 Burr. 2565).

It is not a ground of error that a judge in his discretion has discharged a jury who were unable to agree to a verdict and ordered a fresh jury to be impanelled (*Winsor v. R.*, 1866, L. R. 1 Q. B. 289; *ibid.* in Ex. Ch. 390); nor that consecutive terms of penal servitude have been awarded upon separate counts of an indictment charging distinct offences, although the aggregate punishment is in excess of that allowed by law for one offence (*R. v. Castro*, 1881, 6 App. Cas. 229); nor that the provisions of the Vexatious Indictments Acts have not been complied with (*Boaler v. R.*, 1888, 57 L. J. M. C. 85).

Error in fact lies where some matter of fact is alleged which does not appear on the record, but which, if substantiated, would vitiate the proceedings. For this purpose the writ must be returnable in the Court in which the proceedings have been conducted; hence the description *error coram nobis*; therefore it cannot be assigned upon the record of an inferior Court.

It is neither error in fact nor in law if the whole of the special jurors struck under the old practice were not summoned, nor that the special jury panel was called over and a tales prayed before the time for which they were summoned, for it is not competent for a party to aver anything inconsistent with the record (*Irwin v. Gray*, 1867, L. R. 2 H. L. 20).

Error does not lie upon a summary conviction (see Raymond (Ld.), 469; *Payne v. Wright*, 1892, 61 L. J. M. C. 114; *R. v. Steele*, 1876, 2 Q. B. D. 37).

TO THE QUEEN'S BENCH DIVISION.

Error lies to the Queen's Bench Division where there has been a trial upon indictment or inquisition in the Crown Court at the assizes or at the Central Criminal Court or at a Court of Quarter Sessions. For a recent instance of a writ of error from the assizes to the Queen's Bench Division, see *Richards v. R.*, 1897, 13 T. L. R. 254.

A writ of error is an original writ formerly issuing from the petty bag or common law side of the Court of Chancery, but it now issues from the Crown Office of the Supreme Court (see R. S. C., 13th January 1889). It is directed to the judges of the Court in which the judgment complained of was given, and it may be likened to a *certiorari* to remove the record, and is in the nature of a commission to judges of a superior Court of Appeal by which they are authorised to examine the record upon which a judgment has been given in an inferior Court (in a relative sense), and on such examination to affirm or reverse the same according to law (Bac. Abr. "Error"), or in some cases to amend the same or give such judgment as the Court below ought to have done. The writ cannot be issued without the fiat of the Attorney-General (*Castro v. Murray*, 1875, L. R. 10 Ex. 213), which is granted at his discretion (see *R. v. Newton*, 1855, 4 El. & Bl. 869)—a discretion with which the Court will not interfere (*R. v. Clark*, 1859, 7 W. R. 601 Q. B.); nor will the Court (*R. v. Newton*, *supra*; *R. v. Lees*, 1858, 27 L. J. Q. B. 403) or the Lord Chancellor do so if the Attorney-General refuses it (*In re Pigott*, 1868, 11 Cox C. C. 311). But the Court may quash the writ if it has been improperly obtained with the object of a compromise (*Alleyne v. R.*, 1855, 5 El. & Bl. 399).

To obtain the Attorney-General's fiat it is necessary to lay before him a certificate of counsel showing some ground of error, together with a memorial setting forth the material facts of the case and to verify such facts by a statutory declaration. The writ will be sealed and issued at the Crown Office

upon filing the fiat (for form of fiat, see C. O. R. App., No. 125; and of writ, No. 126).

Provision is made by C. O. Rules 179, 199, 200, and 201 for a stay of execution pending the proceedings of writ of error or appeal to the House of Lords, and for the rearrest of the plaintiff in error in case the writ be quashed or the judgment affirmed (and see *Dugdale v. R.*, 1853, 2 EL. & BL. 129).

The writ when obtained must be lodged with the proper officer of the Court to which it is directed; that official will then make a transcript of the record and return it to the Crown Office annexed to the writ (C. O. R. 185). The original indictment need not be returned, and although a transcript only is returned it is treated as the original record. If the whole record be not certified, or not truly certified, the plaintiff in error may allege a diminution of the record and pray a writ of *certiorari* to have the alleged omission certified (4 Black. Com. 383; *King v. R.*, 1845, 7 Q. B. 795); or if matters be not correctly stated on the record they may be amended on motion to the Court to which the writ is directed (*Gregory v. R.*, 1848, 15 Q. B. 957). But it would seem that diminution cannot be alleged upon a record from an inferior Court (*Hale v. Clare*, 1704, 1 Saik. 266). As to matters which need not be set out, see *Mellish v. Richardson*, 1832, 1 CL. & Fin. 224; *Newton et ux v. Boodle*, 1848, 18 L. J. C. P. 73; *Gully v. Bishop of Exeter*, 1830, 10 Barn. & Cress. 584; *Dunn v. R.*, 1848, 12 Q. B. 1035; *Alleyne v. R.*, 1855, 5 EL. & BL. 399; *Gregory v. R.*, 1846, 8 Q. B. 508; *ibid.* 15 Q. B. 957; *Ayllet v. R.*, 1786, 3 Bro. P. C. 529, 2nd ed.).

After the writ has been returned, the plaintiff in error must assign errors according to the practice regulated by C. O. Rules 187-191. Generally in cases of felony the personal appearance of the plaintiff in error for this purpose is necessary, but latterly it has been dispensed with (see *Richards v. R.*, [1897] 1 Q. B. 574).

Strictly speaking, error in fact and in law cannot be assigned together because of DUPLICITY (see *R. v. Carlile*, 1831, 3 Barn. & Adol. at p. 364), and because they necessitate two distinct modes of trial, but the rule has not been rigidly enforced (*ibid.*; *Knowelden v. R.*, 1864, 5 B. & S. 532). Though several errors in law may be assigned together, but one error in fact may be pleaded, and such assignment must conclude with a verification (see *Juques v. Cesar*, Wins. Saun. 101 q).

If issue be joined upon an error in fact, it must be set down for trial in the same manner as any other jury cause; but if, when error in fact is well assigned and according to form, it is answered by *in nullo est erratum*, the fact is thereby confessed, and the answer is in the nature of a demurrer and will be disposed of as an error in law (for form of assignment, see App. to C. O. R., No. 129).

The practice with regard to joining in error is governed by C. O. Rules, 192-195, and as to the entry for hearing by 196, 197.

Upon the argument one counsel only is heard on each side. Counsel for the plaintiff in error begins, and has a reply (C. O. R. 147). The Court may either affirm or reverse the judgment of the Court below, and upon reversal may discharge the plaintiff in error from custody, or pronounce the proper judgment, or remit the record to the Court below in order that such Court may pronounce the proper judgment (11 & 12 Vict. c. 78, s. 5; and see *Holloway v. R.*, 1851, 17 Q. B. 317).

C. O. R. 203 makes provision for the repayment of any fine received back by the plaintiff in error upon his admission to bail; C. O. Rules 203

and 206 for his render to prison; and C. O. R. 205 for the mode of reckoning the time of imprisonment in case the judgment be affirmed.

TO THE COURT OF APPEAL.

Error in law lies to the Court of Appeal from the Queen's Bench Division—

1. Upon judgments given in that Court upon writ of error;
2. Upon convictions on indictments found in, or removed into, or informations filed in that Court; but only upon some error of law apparent on the face of the record (Jud. Act, 1873, s. 47).

The jurisdiction of the Court of Exchequer Chamber was transferred to the Court of Appeal by sec. 18 of the Judicature Act, 1873, and, subject to rules of Court, the practice in all criminal proceedings in the High Court and Court of Appeal respectively remains as before the Judicature Acts (Jud. Act, 1875, s. 19).

A writ of error for this purpose (Form App. to C. O. R., No. 135) must be obtained in the same manner as the writ of error to the Queen's Bench Division, as above described, and the practice thereon is regulated by C. O. Rules 207 to 215. The rule in the Queen's Bench Division as to hearing only one counsel on each side (*supra*) is not followed in the Court of Appeal.

If judgment be given in the Court of Appeal in favour of the plaintiff in error, that Court may pronounce the proper judgment, and order his discharge if in custody, or remit the record to the Queen's Bench Division to be dealt with according to law (C. O. R. 215; see *King and Another v. R.*, 1844, 7 Q. B. 795).

An appeal lies from a judgment of affirmance in the Court of Appeal to the House of Lords without writ of error, but only with the leave of the Attorney-General (App. Jur. Act, 1876, ss. 3, 4, and 10; see APPEALS TO THE HOUSE OF LORDS—*Criminal Causes*).

[*Authorities*.—Archbold's *Crim. Cases*, 21st ed., and Short and Mellor's *Crown Office Practice*.]

Escape (O. Fr. *Eschape*; Med. Lat. *Ex-cappare*).—In the widest sense of the term an escape is "where one that is arrested gaineth his liberty before he is delivered by course of law" (*Termes de la Ley*). But it is usually confined to cases where the prisoner gets away without the use of force, or the custodian voluntarily or negligently lets the prisoner out of his custody. Where the prisoner is by force or fraud relieved by others against the will of the custodian, it is termed RESCUE (*rescous*), *q.v.*; where the prisoner uses force to obtain his liberty, it is termed PRISON-BREAKING (*q.v.*). Escape in law is quite distinct from flight from justice before arrest or pursuit; as to which, see ARREST; EXTRADITION; FUGITIVE OFFENDERS.

Criminal Cases.—It is a common law offence for a prisoner in custody on a criminal charge to escape from lawful custody, whether he be innocent or guilty of the offence charged, and irrespective of any question of connivance or neglect by his custodians. The offence is a misdemeanour in the nature of a high contempt, punishable on indictment by fine and (or) imprisonment, with or without hard labour (14 & 15 Vict. c. 100, s. 29).

It is immaterial whether the escape is effected by force or artifice or in consequence of neglect, and whether it is made from the custodians in transit to a gaol or lock-up or from the gaol itself; though in the latter event it is usually styled and punished as PRISON-BREAKING (Hawk., P. C.,

bk. i. c. 19). It is also immaterial whether the prisoner is in custody for examination or trial or in execution; but in the latter case he falls within the enactments punishing prisoners found at large during the currency of an unexpired sentence of penal servitude or imprisonment, or contrary to and without satisfying the terms of a conditional pardon. See PARDON; PENAL SERVITUDE; PRISON. It is not now the practice to indict a prisoner for escape before trial, since if he is retaken he can be sufficiently punished on conviction.

It is also an offence for any person who lawfully has the custody of a person actually and lawfully arrested for a criminal matter, either voluntarily or negligently to permit him to escape from custody until he is delivered therefrom by due course of law (Hawk., P. C., bk. ii. c. 19, ss. 1, 2, 3, and 4).

There is a certain amount of ancient learning as to what amounts to such an arrest as will or will not make the custodian amenable for an escape; but in substance the custodian will be liable for letting his prisoner go, unless (1) he be not held on warrant and the circumstances of suspicion are so slight that the imprisonment is false: (2) he be held on a warrant which obviously and on the face of it is irregular and bad (Hawk., P. C., bk. ii. c. 19, ss. 2, 24). The books also draw some distinction between escape from the custody of officers of the law and that of private persons, but it is of degree only and not of kind, save that a private person can discharge himself of further liability by turning over his prisoner to the proper public officer, i.e. sheriff, gaoler, or constable, or by taking him before a magistrate (Hawk., P. C., bk. ii. c. 20).

An escape permitted by a custodian is said to be voluntary where the custodian gives the prisoner his liberty with the object of saving him from trial and punishment. Hawkins (P. C., bk. ii. c. 19, s. 10) and Russell (6th ed., vol. i. p. 891) seem to limit this to persons accused and guilty of capital offences; but according to Archbold (*Cr. Pl.*, 21st ed., p. 911) and Stephen (*Dig. Cr. Law*, 5th ed., p. 115) it is immaterial whether the offence was treason, felony, or misdemeanour. The common law punishment for a voluntary escape is said to have been the same as that for the crime of which the prisoner was accused (Hawk., P. C., bk. ii. c. 19, ss. 14, 22), but could not be punished except upon rearrest and conviction of the escaped prisoner (Steph. *Dig. Cr. Law*, 5th ed., p. 115). In modern times a voluntary escape of a felon, if sufficiently deliberate, would render the custodian liable as an accessory after the fact, or in certain events for conspiracy to defeat the course of justice; and irrespective of these considerations the custodian is liable to conviction and fine and imprisonment for a misdemeanour, which may be described in the case of a private person as a high contempt, and in the case of an officer of the law as official misconduct (Archb. *Cr. Pl.*, 21st ed., 912).

An escape is said to be negligent where the prisoner commits suicide or escapes against the will of his custodian, but without force and in consequence of insufficient care or vigilance of the custodian or of subordinates for whom he is responsible (Russ. on *Crimes*, 6th ed., vol. i. p. 892). It is a misdemeanour punishable at common law by fine or imprisonment without hard labour, and the guilt or innocence of the prisoner is immaterial (Hawk., P. C., bk. ii. c. 19, s. 14). The view of Hawkins (bk. ii. c. 19, s. 31) that it was punished by fine only, adopted in Russell, vol. i. p. 897, is based on a misconception of the nature of fines in the mediæval Courts, and on omission to consider that they were made as a compromise of the proceeding or substitution for the imprisonment which the Court could impose (2 Pollock

and Maitland, *Hist. Eng. Law*, 512). Constables who negligently let their prisoners escape are punishable for neglect of duty. See POLICE.

There is no modern precedent of an indictment of a private person or official for negligently allowing the escape of a criminal prisoner, and while various statutes provide that the transfer by a gaoler from the prison of his county to another county under their provisions is not to constitute an escape, the enactments relating to aiding prisoners to escape are confined to the case of prisoners actually in a gaol or 'prison, and will be dealt with under PRISON-BREAKING.

But at common law and under the Accessories and Abettors Act, 1861, persons who aid a prisoner to escape from custody before he is put in gaol are liable as principals in the offence of escape or the offence of RESCUE; and see FUGITIVE OFFENDERS; NAVY; and they are also guilty of felony (against 16 Geo. II. c. 31, s. 3) if they assist a prisoner to attempt to escape from a constable or peace officer carrying him to prison under a warrant for treason or felony (Steph. *Dig. Crim. Law*, 5th ed., 118).

Recapture.—The custodian of a prisoner is said not to be entitled to retake him where he has voluntarily permitted his escape (Hawk., P. C., bk. ii. c. 19, s. 12); but this means no more than that he cannot purge his offence by so doing. Where the escape has arisen from negligence, the custodian by fresh pursuit, and retaking before the prisoner gets out of sight, can purge his offence, the escape not being regarded as complete till the prisoner is out of sight (Steph. *Dig. Crim. Law*, 5th ed., 116; Clerk and Lindsell on *Torts*, 2nd ed., 175), and even if he has got out of sight is entitled to pursue and retake him; but the recapture can be pleaded by the custodian merely in mitigation of the penalty incurred by reason of his original neglect (Hawk., P. C., bk. ii. c. 19, s. 12).

Considerable controversy has from time to time arisen on the question whether the officers of the law or persons entitled to apprehend or detain a person accused or suspected of crime are entitled to kill him on pursuit if they cannot otherwise stop him, or to kill him to prevent his escape after arrest. It seems to be agreed that the custodian is not entitled to kill to prevent escape from custody on a civil charge, nor from custody on a charge of misdemeanour (*R. v. Forster*, 1825, 1 Lew. C. C. 187; Russ. on *Crimes*, 6th ed., iii. 132; 1 East, P. C., bk. v. s. 91; Hawk., P. C., bk. i. c. 28, s. 13). Where the escaped prisoner is accused of a capital offence, the custodian appears to be entitled to kill him if he cannot otherwise retake him (*R. v. Dodson*, 1851, 2 Den. Cr. C. 35); but it is not clear whether the mitigation of the severity of the law as to punishments for felony during this century can be regarded as reducing the right of the officers of the law to kill a fugitive from justice. With respect to convicts under sentence of penal servitude escaping from prison, questions arose in 1896 owing to the shooting of an escaping convict on Dartmoor (see 32 L. J. N. 4; 43 Parl. Deb. N. S. 188; 44 *ibid.* 508), which cannot be regarded as settled, and which have led to a revision of the Convict Prison Rules.

Prisoners of War.—Assisting the escape of prisoners of war is a felony punishable under 52 Geo. III. c. 156.

As to escape from *reformatories and industrial schools*, see INDUSTRIAL SCHOOLS; REFORMATORY.

As to escape of *inebriates and lunatics*, see INEBRIATES ACTS; and ASYLUMS, vol. i. p. 381.

Civil Cases.—The common law offence of escape does not apply to prisoners in custody on civil process. But where a sheriff or his officers permit a civil prisoner to escape who is not bailable or bailed, they are

liable to attachment (Beven, *Negligence*, 2nd ed., 321), and are now also summarily punishable for misconduct under sec. 29 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55). At common law an action for damages also lay against the high sheriff for any loss sustained through the escape by the party at whose suit the prisoner was arrested. Under the section above cited (s. 29) the high sheriff and his officers concerned are also liable to an action for debt, for forfeiture of £200, and the damages sustained; which must be brought within two years of the offence. Under 5 & 6 Vict. c. 38, s. 31, persons other than sheriffs who allow an escape of a debtor or executor are liable to an action of damages at the suit of the execution creditor.

Any keeper of a prison who takes a reward to connive at the escape of a civil prisoner incurs liability to a fine of £500, loss of office, and incapacity to serve again (8 & 9 Will. III. c. 27).

[*Authorities*.—Hawk., P. C., bk. ii. cc. 19, 20; Burn, *Justice*, 30th ed., tit. "Escape"; Russ. on *Crimes*, 6th ed., vol. i. p. 889; Archb. *Cr. Pl.*, 21st ed., 911; Stephen, *Dig. Crim. Law*, 5th ed., 115–120; *Com. Dig.* tit. "Escape"; *Fin. Abr.* tit. "Escape."]

Escape Warrant was a warrant issued under statutes of 1702 and 1707 (1 Anne, St. 2, c. 6, and 6 Anne, c. 12, ss. 1–4), passed for the better preventing escapes out of the Queen's Bench and Fleet prisons. These Acts dealt with persons committed, rendered, or charged in the custody of the marshal of the Queen's Bench or to or in the Fleet prison either in execution or upon mesne process, or for contempt by disobedience to an order or decree of any of the superior Courts at Westminster. If such a person escaped or was at large, one judge of the Court having cognisance of the proceeding had authority in which the prisoner was arrested (on the oath of one or more witnesses) to grant a warrant addressed to all sheriffs, mayors, and constables of England, Wales, and Berwick-on-Tweed, for the arrest of the prisoner and his conveyance to the place used as a debtors' prison in the county of arrest (6 Anne, c. 12, s. 1). The Acts do not apply to criminal cases, and a special exception is contained in the Act enabling the Crown to deal with the prisoner if accused of any crime. The FLEET PRISON was pulled down in 1845, and its occupants removed to the Queen's Bench Prison in Southwark, which was discontinued in 1862 and Whitecross Street Prison substituted (25 & 26 Vict. c. 104, s. 2). Holloway Prison has now been made the Queen's prison under 25 & 26 Vict. c. 102, s. 12. See Secretary of State's Order of June 15, 1889, St. R. & O., Revised, vol. v. p. 657. The Acts seem still, so far as they are unrepealed, to apply to Holloway Prison; but their operation is necessarily restricted to persons held for contempt or under writs or warrants in the nature of *ne exeat regno*, or under the Bankruptcy Acts.

Escheat—The rule of law under which, on the extinction of the blood of a holder of land, the land reverts to the lord of the fee. Such extinction can now take place only by failure of heirs, but until 1870, when corruption of blood (*q.r.*) was abolished by the Forfeiture Act, it might take place, except in the case of gavelkind lands, on attainder for treason or murder, and until 54 Geo. III. c. 145, 1814, upon attainder for any capital felony (see **ATTAINDER**; **FORFEITURE**). Escheat is of feudal origin, and one of the five marks of feudal tenure; it applied, however, equally to tenure by

soilage, by which, since 1660, all ESTATES OF INHERITANCE (except those held by FRANKALMOIGN and COPYHOLD LANDS) have been held (12 Car. II. c. 24). The most common cause of escheat is bastardy (see BASTARD), for a bastard, being *nullius filius*, can have no heir but an heir of his body. On an escheat of freehold, the Crown, as lord paramount of all the lands in the kingdom, obtains the land unless some other person can show that the land was held of him and not of the Crown, in which case he is entitled to it (see *Doe v. Redfern*, 1810, 12 East, 96). An alienation of the lands in the owner's lifetime, or a disposition by will, prevents escheat; but it has been doubted whether the Wills Act applies to such a case, and whether, therefore, the will of a person who has no heir should not be attested by three witnesses, as before the Act. In consequence of the fact that since the Statute of *Quia Emptores* (1290) it has not been lawful to create a tenure of an estate in fee-simple, cases where tenure of a lord other than the Crown can be shown are rare. By the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71, s. 4), the law of escheat is thenceforward to apply in the case of the death intestate and without heirs of owners of estates or interests in incorporeal hereditaments in the same manner as if the hereditaments were corporeal (*e.g.* in the case of a rent-charge). Formerly an incorporeal hereditament did not escheat, but simply became extinguished. The law of escheat applies to copyholds as well as to freeholds, but a copyhold cannot escheat to the Crown (*Walker v. Denne*, 1793, 2 Ves. Jun. 170, at p. 187). The lord is entitled to claim it, and if he has not created in it any estate not demised or demiseable by copy of Court Roll (which destroys its copyhold character), he may again grant it out to be held by copy (*French's case*, 1576, 4 Co. Rep. 31 a). A presentment by the other tenants of the tenant's death is not necessary, but a proclamation must be made at three successive Courts for the heir of the deceased, and if no copyholder was present at the Court, these proclamations are not binding on any person whose right is affected unless they be served on him within one month (Stat. 4 & 5 Vict. c. 35, s. 86, 1841; see as to proclamations, *Ecclesiastical Commissioners v. Parr*, [1894] 2 Q. B. 420; and *Beighton v. Beighton*, 1895, 43 W. R. 685). A lord taking by escheat takes subject to the wife's freebench (see HUSBAND AND WIFE), and to any lease duly made by the copyholder or other prior interest duly created. On a common law enfranchisement the right to escheat cannot be reserved, but it remains after an enfranchisement under the Copyhold Act, 1894 (57 & 58 Vict. c. 46). Formerly, upon the death intestate and without heir of a trustee or mortgagee of freehold or copyhold land, the lord was entitled by escheat, and it was doubtful whether he was bound if he had no notice of the trust or mortgage; but by the Trustee Act, 1850 (13 & 14 Vict. c. 60), the provisions of which are re-enacted by the Trustee Act, 1893 (56 & 57 Vict. c. 53), the High Court is empowered to make a vesting order as to such lands (see also *In re Godfrey*, 1883, 23 Ch. D. 205). * On the death intestate and without heir of a *cestui-que trust* or mortgagor, there was no escheat (see *Gallard v. Hawkins*, 1884, 27 Ch. D. 298), but in the former case the trustee took the estate discharged from the trust, and in the latter the equity of redemption belonged to the mortgagee, subject to the mortgagor's debts. But now by the Intestates Estates Act, 1884 (*ubi supra*), the law of escheat applies in the same manner as if the estate or interest were a legal one, and by the same Act an undisposed* of beneficial interest in real estate is for the purposes of the Act treated as if an intestacy had occurred, so that the Crown or other lord is entitled to such beneficial interest if there is no heir (see *In re Wood*, [1896] 2 Ch. 596).

As to procedure where the Crown, Duchy of Cornwall, or Duchy of Lancaster claims, see the Escheat (Procedure) Act, 1887 (50 & 51 Viet. c. 53); see also COPYHOLD.

[*Authorities*.—Williams, *Real Property*, 18th ed.; Challis, *Real Property*, 2nd ed., 1892; Elton on *Copyholds*, 2nd ed., 1893; Scriven on *Copyholds*, 7th ed., 1896; Lewin on *Trusts*, 9th ed., 1891.]

Escort.—See CONVOY.

Escrow.—The word escrow properly signifies writing. When an instrument is delivered to a person who is a stranger to it, to be by him delivered to the other party or parties to it upon the performance of some condition, it is styled an escrow, that is to say, a mere writing as distinguished from a deed. Where, however, the condition has been performed, the instrument takes effect from the time of its execution. An example of an escrow is the execution and delivery of a purchase deed of real estate by a vendor to his solicitor, to be delivered to the purchaser on the payment of the purchase money.

In delivering an instrument as an escrow, it is not necessary to state formally that it is delivered as an escrow; the mere fact of its being delivered to take effect upon a condition being sufficient to constitute it escrow; for instance, if parties employing the same solicitor deliver to him a deed with instructions that it is not to take effect until something further is done, such deed will take effect as an escrow (*Millership v. Brooks*, 1860, 5 H. & N. 597; *Nash v. Flynn*, 1844, 1 Jo. & Lat. 162). It is laid down in Shepherd's *Touchstone*, pp. 58, 59, "that the deed be delivered to one that is a stranger to it, and not to the party to whom it is made"; but nevertheless it has been held in a modern case that the delivery to the solicitor of the grantee, who is in a sense the grantee's agent, of an instrument executed by the grantor, will not convert an instrument from an escrow into a deed, provided that the delivery is of such a character as to negative the fact that a delivery to the grantee was ordered (*Watkins v. Nash*, 1875, L. R. 20 Eq. p. 162).

[*Authorities*.—Shepherd, *Touchstone*, 58, 59; *Co. Lit.* 36a; Smith on *Contracts*; Elphinstone, *Introduction to Conveyancing*, pp. 47, 48; and see further, article DEED.]

Esquire (*Armiger*—*Scutifer*).—The term esquire (in Norman-French, *escuyer*) originally denoted the attendant of a knight who bore his shield or armour; and it is translated in mediæval Latin by *armiger* or *scutifer*. Esquires were aspirants for knighthood and below that degree, as in their modern condition they continue to be. The title is not one of dignity (see HONOUR), but as it is termed of worship. According to Sir Edward Coke (2 *Inst.* 668) every one is entitled to be termed esquire who has the legal right to call himself a gentleman; the latter being a man who lawfully bears a coat of arms either conferred upon him or inherited. But there is a certain amount of doubt as to who are entitled to be termed esquires. An estate, however large, is said (*Black. Com.* bk. i. ch. xii.) not to confer the right; but in *Perrins v. The Marine and General Travellers Insurance Co.*, 1860, 2 El. & El. 317, it was held that a description in a life policy of the assured as an esquire was not untrue, although he was

an ironmonger in business, if he were in that position of life in which people are usually so addressed.

The following classes may be mentioned as certainly recognised esquires upon all occasions of ceremony or of precedency, and for the purpose of legal description:—

1. All the sons of peers and lords of Parliament during the lives of their fathers, and the younger sons of such peers, etc., after their fathers' deaths; the eldest sons of the younger sons of peers, and their eldest sons in perpetual succession;
2. Noblemen of other nations;
3. The eldest sons, and probably all the sons of baronets and the eldest sons of knights;
4. Persons bearing arms by letters patent with the title of esquire;
5. Esquires of the Bath, and their eldest sons according to the statutes of the Order (*q.v.*);
6. Barristers-at-law, by their office or profession;
7. Justices of the peace and mayors while in the commission or in office;
8. Persons holding any superior office under the Crown;
9. Persons styled esquires by the Sovereign in their patents, commissions or appointments;
10. Attorneys in colonies where the departments of counsel and attorney are united.

[*Authorities*.—Coke, 2 *Inst.* 668; Black. *Com.* bk. i. ch. xii.; Com. *Dig.* tit. "Dignity"; Burke, *Peerage*, art. "Precedency." See also HONOUR, TITLES OF; KNIGHTHOOD; PRECEDENCE.]

Essoin, Essoign, or Exoine (*Essoigner*, O. F.; Med. Lat. *Essoviare*).—(1) The allegation of an excuse for non-appearance at the appointed time in answer to a writ; (2) the excuse itself. Making the excuse was termed casting the essoin. The mediæval procedure as to essoins is set out in Bracton, *de Essoinis* (ed. Twiss, vol. v. p. 130). The excuses usually allowed were (1) *de malo lecti*, bed-sickness (13 Edw. I. c. 17); (2) *de malo veniendi*, hindrance by sickness in coming; (3) *ultra mare*, absence beyond seas, on pilgrimage or the king's service or otherwise (3 Edw. I. c. 44). Viner (*Abr. s.v.*) gives also a fourth, protection, as to which see PROTECTION, WRIT OF. The essoin could not be made by the party in person and need not be verified by oath (1259, 43 Hen. III. c. 20; 1 Stat. Realm, 10), except where the king's service was set up. Originally an essoin could be obtained after appearance, but under the Statute of Marlborough (1267, 52 Hen. III. c. 13) one essoin only was allowed after issue joined; and essoins after appearance were forbidden in 1275 (3 Edw. I. St. West. 1, cc. 42, 43, 44), and by a statute attributed to 12 Edw. II. (1 Stat. Realm, 217), further provisions are made for limiting and challenging essoins.

The superior Courts had an essoin day on the first general return day of a term, on which essoins were received and entered in the essoin rolls made up by the proper officers (3 Black. *Com.* 277 n; 3 Chit. *Gen. Pr. Law*, 89–93):

There is an abundance of learning (Vin. *Abr.* tit. "Essoign Q.") as to the proceedings in which essoins could be cast. Essoins ceased to be of utility on the change of procedure in personal actions (2 Will. IV. c. 39), and on the abolition of real actions (3 & 4 Will. IV. c. 27, s. 37); and the essoin day

was abolished in 1830 (11 Geo. IV. and 1 Will. IV. c. 70, s. 6; *Price v. Hughes*, 1832, 1 Dowl. P. C. 448).

[*Authorities*.—Bracton, *de Essoniis*, *sup. cit.*; Vin. Abr. tit. "Essoign"; Com. Dig. tit. "Exoine."]

Estate and Effects.—The word "estate," when used without the qualification real or personal, or as signifying an interest in land, has the same meaning as the word "effects," namely, property in the widest sense; and the phrase, if also unqualified, is simply coextensive with each of the separate words. In a will they would, if standing alone, pass real estate; and whether in particular cases they do or do not, depends on the intention of the testator as gathered from the context (*Stokes v. Salomons*, 1851, 20 L. J. Ch. 343; *Cord v. Holderness*, 1855, 20 Beav. 147; and the cases in Jarman on *Wills*, 5th ed., pp. 670-705, and Theobald, *Laws of Wills*, 4th ed., 175-178).

Estate and House Agent.—The ordinary business of an estate and house agent is to introduce purchasers and tenants for, and to negotiate for the sale and letting of, houses, shops, and other properties, on commission.

Authority and Duties.—An estate or house agent who is instructed to find a purchaser for property has no implied authority to enter into a contract for the sale thereof, even if the principal names a fixed minimum price, because it is not usual for such an agent to enter into contracts on his principal's behalf unless expressly authorised to do so. It is his duty to submit any offers which may be made to him to the principal, and if he enters into such a contract without express authority, the principal is not bound thereby (*Chadburn v. Moore*, 1892, 61 L. J. Ch. 674; *Hammer v. Sharp*, 1874, L. R. 19 Eq. 108; *Prior v. Moore*, 1887, 3 T. L. R. 624). As to the duty of an estate or house agent to exercise reasonable care in the conduct of his business, see *Hayes v. Tindall*, 1861, 1 B. & S. 296; *Smith v. Barton*, 1866, 15 L. T. 294. As to his duty with regard to accepting a cheque in lieu of cash where he is authorised to receive payment of money, see *Pape v. Westacott*, [1894] 1 Q. B. 272.

Liability to Third Persons.—An estate or house agent may become liable to third persons by contracting personally (*Long v. Millar*, 1879, 4 C. P. D. 450), or by entering into a contract without the authority of the principal (see PRINCIPAL AND AGENT, *Implied Warranty of Authority*).

Remuneration.—The right of an estate or house agent to commission or remuneration for his services is governed by the same general principles as those which govern the right to remuneration of agents generally, as to which the reader is referred to the article on PRINCIPAL AND AGENT. In this article, reference will be made to those cases, and those cases only, in which the claims of estate or house agents were in dispute. Where, as is very often the case, an agent is employed to find a purchaser or tenant, on the terms that he is to receive a fixed commission, to be payable only in the event of success, he is *prima facie* not entitled, in the absence of success, to claim any remuneration for the services rendered in trying to effect a sale or procure a tenant, because such a claim is inconsistent with the terms of the contract (*Green v. Mules*, 1861, 30 L. J. C. P. 343). So, if the commission is payable on completion of the transaction, the agent has no claim, unless either the transaction is completed, or the non-com-

pletion thereof is due to the default of his principal (*Lott v. Outhwaite*, 1893, 10 T. L. R. 76; *Kirk v. Evans*, 1889, 6 T. L. R. 9; *Beningfield v. Kynaston*, 1887, 3 T. L. R. 279). Where, however, the agent has procured a purchaser, or otherwise done all that he contracted to do, and the principal refuses to complete, the agent is entitled to recover, as damages for wrongfully preventing him from earning his commission, the full amount which he would have earned if the transaction had been duly completed (*Prickett v. Badger*, 1856, 1 C. B. N. S. 296). And where the commission is payable upon a purchaser being procured, it is sufficient, as a general rule, if the agent procures a binding contract which is accepted by the principal, or otherwise substantially procures a purchaser, though the transaction afterwards goes off, whether by reason of the principal's default or not (*Horford v. Wilson*, 1807, 1 Taun. 12; *Rimmer v. Knowles*, 1874, 30 L. T. 496; compare *Grogan v. Smith*, 1890, 7 T. L. R. 132).

To maintain a claim for commission upon a transaction, it is necessary for the agent to show that the transaction was a direct result of his agency (*Taplin v. Barrett*, 1889, 6 T. L. R. 30; *Lofts v. Bourke*, 1884, 1 T. L. R. 58), and that it was within the scope of his authority to bring about such transaction (*Gillow v. Aberdare*, 1893, 9 T. L. R. 12). If an agent is employed to let an estate, and the tenant procured by him subsequently buys it without further communication with him, he is not entitled to commission in respect of the sale (*Toulmin v. Millar*, 1887, 58 L. T. 96). So, if an agent lets a house for a term, and the tenant subsequently takes it for a further term through the intervention of some other agent, the agent procuring the original contract is not entitled to commission in respect of the further term (*Curtis v. Nixon*, 1871, 24 L. T. 706). But it is sufficient for the agent to show that he introduced a person who ultimately became a tenant or purchaser in consequence of such introduction, though the transaction was completed through the instrumentality of other agents, and though he was not acting for the principal at the time of the completion (*Burton v. Hughes*, 1885, 1 T. L. R. 207; *Green v. Bartlett*, 1863, 14 C. B. N. S. 681; *Thompson v. Thomas*, 1895, 11 T. L. R. 304; *Ex parte Durrant*, 1888, 5 Mor. Bky. 37; *Mansell v. Clements*, 1874, L. R. 9 C. P. 139; *Steere v. Smith*, 1885, 2 T. L. R. 131). Where there are several introductions by different agents, it is a question of fact which introduction brought about the transaction (*Barnett v. Brown*, 1890, 6 T. L. R. 463).

[*Authorities*.—Bowstead on *Agency*; Evans on *Remuneration of Commission Agents*.]

Estate and Interest.—By the sale of a person's "estate and interest" in a property and business it was held in *Pearson v. Pearson*, 1884, 27 Ch. D. 145, that the goodwill of the business passed to the purchaser. See also Stroud, *Jud. Dict.*

Estate Clause.—In conveyances of estates prior to the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a clause called the "all estate clause" was almost invariably inserted after the grant of the parcels and the general words, and was as follows:—"And all the estate, right, title, interest, claim, and demand of the grantor in, to, and upon the said premises" (David, *Prec. Con.*, 4th ed., vol. ii. Part I.). The alleged

reason for its insertion was that where a party intended to transfer all his interest in any denomination of land, it was necessary for the purpose of passing any particular estates or interests vested in him distinct from the estate or interest he purported to convey, and otherwise than in the character in which he became a party to the conveyance. But before the Act it was settled law that every such particular estate or interest would pass, unless it appeared by the context of the deed that it was not intended to pass: in which latter case the clause would not have the effect of passing it. It had therefore become surplusage, and sec. 63 of the Conveyancing Act, 1881, embodies the existing law by enacting that every conveyance, which includes lease, shall, by virtue of the Act, pass all the estate, etc., which the conveying parties respectively have in the property conveyed, or which they have power to convey in the same, unless a contrary intention is expressed in the conveyance. The clause, therefore, is now omitted in reliance on this statutory provision.

[*Authorities*.—Wolstenholme and Brinton, *Conveyancing, etc., Acts*, 6th ed., p. 119; Elphinstone, *Interpretation of Deeds*, pp. 204–209; and *Conveyancing*, 3rd ed., p. 99.]

Estate Duty.—The term “estate duty” is applied to (a) temporary estate duty under 52 Vict. c. 7; (b) estate duty under the Finance Act, 1894 (s. 1); (c) settlement estate duty under the same Act (s. 5). All property passing on a death on which estate duty is leviable (wherever situate) is, for the purpose of fixing the rate of duty, aggregated as one estate, except in certain cases. The whole subject is discussed under DEATH DUTIES, vol. iv. pp. 129–136.

Estates.—The English law knows of no absolute ownership in realty, it recognises only an estate in such property, and the word “estate” in this sense has a meaning strictly in accordance with its derivation (viz. Latin *status*), the condition or relation in which the so-called owner stands with regard to his land. “Estate signifies such an inheritance freehold term of years . . . or the like as any man hath in lands or tenements, and by a grant of his estate as much as he can grant shall pass” (*Co. Lit.* :45). It must be observed that “estate” implies some kind of actual interest, and no estate is given by, e.g. (1) a bare possibility (as, for instance, the expectation of an heir-apparent), or (2) a mere power, or (3) a revocable licence or permission to use certain land (*Jones v. Roe*, 1817, 3 T. R. 93; 1 R. R. 656; *Hewitt v. Isham*, 1851, 7 Ex. Rep. 77).

Estates may be either legal (*q.v.*) or equitable (*q.v.*). For the purpose of classification, legal estates alone need be dealt with. Estates admit of various modes of classification, according to the light in which they are considered. Blackstone considers them in a “three-fold light” (3 Black. Com. cc. viii.–xiii.), and his method may be followed with convenience—

- I. According to the quantity of interest which the tenant has in the tenement, i.e. the duration of the enjoyment.
 - II. According to the time at which that quantity of interest is to be enjoyed, i.e. the time at which the enjoyment begins.
 - III. According to the number and connection of the tenants.
- I. The primary division of the quantity of interest is into freehold and less than freehold.

Dealing first, then, with estates of freehold interest, these are subdivided into freeholds of inheritance and freeholds not of inheritance. Freeholds of inheritance are either absolute or limited; the former is for an estate in fee-simple, the "largest" estate known to English law.

A freehold of inheritance is limited when it is clogged or confined with conditions or qualifications of any sort, as, *e.g.*, a grant to A. and his heirs, tenants of the manor of Dale, the grant being defeated whenever the heirs of A. cease to be tenants of the manor (2 Black. Com. p. 109). Upon these conditions or qualifications depend the duration of the enjoyment. These limited freeholds are subdivided into—

1. Qualified or base fees (see BASE FEE);
2. Fees conditional, so called at common law by reason of the condition in the gift that, if the donee died without certain particular heirs (*e.g.* male, of his body) the land should revert to the donor. These fees were after the Statute de Donis called *fees tail*. Fees tail, commonly called *estates tail*, may be either (1) general (*e.g.* to A. and the heirs of his body), or (2) special (*e.g.* to A. and the heirs of his body on B, his wife to be begotten); and estates tail, general or special, may in turn admit of subdivision (with regard to the sex, if it be specified, of the heirs) into tail male and tail female.

Blackstone mentions yet another species of entailed estates grown out of use already in his time, viz. estates in *libro maritaggio* or *frankmarriage* (see FRANKMARRIAGE).

Freehold estates not of inheritance may be considered under two main heads, according to their origin, *i.e.* whether they are created by act of party, called *conventional*, seeing that they are the result of an agreement, or whether they are created by construction and operation of law, called *legal*.

The "conventional" freehold estates not of inheritance are estates for life expressly created by grant or deed as in a gift to the donee of lands to hold for the term of the donee's life, or of any other life or lives, in which latter case it is called an estate *pur autre vie*. And an estate for life may be created not only by express limitation, but by a general grant without words of limitation, *i.e.* a gift of the manor of Dale to A. B. makes A. B. tenant for life thereof. This very old rule of the common law is still in force with regard to deeds; but as to wills made after the passing of the Wills Act, 1837, that Act provides that a devise of real estate to any person without any words of limitation shall be construed to pass the fee-simple or other the whole estate or interest, of which the testator had power to dispose, unless a contrary intention appear by the will (Stat. 7 Will. IV. and 1 Vict. c. 26, ss. 28, 34). While on this point, it is interesting to note how in the permanence till so late a time of this very old rule of construction—by which a gift of land without qualifying words was interpreted as a gift to be enjoyed by the donee during his life only, and not as an absolute gift of property, which could endure after the donee's death or be alienated in his lifetime—we have a striking proof and token of the repugnance to English law of any idea approaching absolute ownership in land. And long after the people had become accustomed to, and did, in fact, entertain such an idea, the law continued to construe the so-called "intention" of a testator in accordance not with the popular but with the legal conception, till the Wills Act remedied this manifest violation of the true intention of the will.

The *legal* freehold estates not of inheritance are the estates of (1) a

tenant by the curtesy of England, (2) a tenant in dower, (3) a tenant in tail after possibility of issue extinct.

Estate by the curtesy is the estate for life which by the common law a man has, on the death of his wife, in lands whereof she was seised during the marriage. The requisites for such an estate are (a) marriage; (b) actual seisin of the wife; (c) issue born alive during the marriage and capable of inheriting their mother's estate (see MEDICAL JURISPRUDENCE); (d) death of the wife. (See CURTESY.)

Estate in dower is the estate for life which by the common law a woman has, on the death of her husband, in a portion (i.e. one-third, except under special customs) of his lands. (See HUSBAND AND WIFE.)

A tenancy in tail after possibility of issue extinct arises from one of two causes, viz.—(a) the death without issue of the person from whose body the issue was according to the terms of the gift to come; (b) the extinction of such issue. (See ESTATES OF INHERITANCE.)

We have now exhausted freehold estates and pass to the consideration of those estates which are less than freehold. These are commonly called "chattels real." Before proceeding to consider these, we may say of the term chattels real that to the English law whatever estate is not a freehold is a chattel, but inasmuch as it "savours" (to use the old phrase) of the realty it is called a chattel real as distinguished from a chattel personal, which does not "savour" of the realty (2 Black. Com. pp. 386, 387).

Estates less than freehold are divided into (1) estates for years; (2) estates at will; (3) estates at sufferance. These are treated under the headings TERMS OF YEARS; WILL, ESTATES AT; SUFFERANCE, ESTATES AT, but a few general remarks may not be out of place here. Estates for years owe their origin to a desire to encourage small farmers and cultivators of the soil by giving them some more permanent interest in the land than one determinable at the will of the lord. Such estates were at first very short. All estates for years have, in the eyes of the law, the same attributes, but for the purposes of conveyancing they may be divided into two classes, having regard to the purposes for which they are used—(1) Terms of years created by leases with a rent reserved; (2) terms of years created by wills and settlements, often long terms of 500 or 1000 years; the purpose of these latter being the raising of money, e.g. for portions, jointures, etc., the term of years superseding the freehold estate till the requisite sum is raised. Term in this sense, it should be added, signifies the "estate" itself that is granted, and not merely the period of time specified; and, indeed, during the continuance of such time the term may often expire or be satisfied (e.g. by surrender or cesser of the purpose for which it was created). Between the two classes of terms of years equity makes a distinction in the matter of the rights of use and enjoyment which it allows to the person or persons in whom the terms are respectively vested. The grantees of a "long" term are subject to much greater restrictions; they can only exercise the rights expressly conferred on them by the instrument creating it, nor can they use the term except for such purpose as it was created, and until it becomes necessary to carry out such purpose. And when such purpose has been carried out, the term becomes a "satisfied" term and expires (see SATISFIED TERMS). An estate for years may be one held only from year to year, called a yearly tenancy; any estate for years is greater than an estate at will or sufferance. We have now finished the consideration of estates as classified according to their quantity of interest, and this being the main classification, it will be convenient, for the sake of

clearness, to give this classification with its main subdivisions in tabular form.

QUANTITY OF INTEREST.

Freehold	Of inheritance	Absolute = fee-simple Qualified or conditional = estates tail. Conventional = estates for life : estates <i>pur autre vie</i> .
	Not of inheritance	Legal = dower: curtesy: tenant in tail after possibility of issue extinct.
Less than freehold	{ Estates for years (including tenancy from year to year, <i>i.e.</i> yearly tenancy). { Estates at will. { Estates at sufferance.	

There remains another species of estates—"estates upon condition" (see CONDITIONS). These are reserved by Blackstone till the last, "because they are more properly qualification of other estates than a distinct species of themselves" (2 Black. Com. p. 152). In reality it is not a subdivision of estates according to their quantity of interest. These estates depend for their existence upon the happening or not happening of some uncertain event, and any "quantity of interest" may depend for its existence upon these conditions.

Estates upon condition are divided into—

1. Estates upon condition implied.

2. Estates upon condition express.

1. *Estate upon condition implied*, *e.g.* if A. grant an office (*e.g.* stewardship) to B., the estate which B. has in such office is subject to a condition implied by the law that B. shall properly discharge such office, and upon violation of such duty the office is forfeited (*Bartlett v. Downes*, 1825, 3 Barn. & Cress. 619; Lit. s. 378, there quoted).

2. *Conditions express* are either precedent or subsequent. A condition precedent is one that must happen before the estate can vest or be enlarged. A condition subsequent is one the non-performance of which will defeat an estate already vested. Besides these estates on condition subsequent, estates may be created "by a conditional limitation, which is where an estate is so expressly defined and limited by the words of its creation that it cannot endure for any longer time than the contingency happens upon which the estate is to fail" (Stephen's *Commentaries*, vol. i. p. 295, 8th ed., quoted in *In re Mackie*, 1882, 21 Ch. D. at p. 843).

A condition subsequent or a condition of re-entry is where the grant is made subject to such a condition, generally contained in the deed of grant itself, and provides that if and when a certain specified contingency shall happen before the natural expiration of the estate thereby granted then and in such case such estate shall be defeated, be void, or the grantor shall re-enter. The condition may, however, be contained in a separate deed; this deed is called a defeasance. Though a separate instrument, it must be made between the same parties as are parties to the conveyance to which it is collateral. The principal use of defeasances was to counteract the effect of the rule in *Dumfries's case* (1 Sm. L. C., 10th ed., p. 32), whereby it was held that a first licence granted determines for ever a condition not to alien without licence. The defeasance was used to revive the condition.

But the rule in *Dunpor's* case ceased to have any operation as regards such conditions by virtue of 22 & 23 Vict. c. 35 and 23 & 24 Vict. c. 38 (see further as to defeasances, *BILLS OF SALE*, vol. ii. pp. 135, 141; *COGNOVIT ACTIONEM* and *WARRANT OF ATTORNEY*).

We may notice here another class of assurance, viz. a *confirmation*, the purpose of which is practically the converse of that of the defeasance. The deed of confirmation is used to make sure and unavoidable a voidable estate, or to increase a particular estate. The operative words are, "have given, granted, ratified, approved, and confirmed." No livery of seisin is necessary for its validity, but a deed is essential to an express confirmation. Confirmation, however, may arise also by implication of law. (Stephen, *Com. cap. xvii.*; *Co. Lit.* 295 b.)

Of estates upon condition, Blackstone takes three specific varieties—(1) mortgage estates; (2) estates by statute merchant or statute staple; (3) estates by elegit. Of which it is only necessary to say here that estates by statute merchant and statute staple were given as security for acknowledged debts by merchants, and conferred on the creditor the right to take the rents and profits of the debtor's land till the debt was duly satisfied; and estate by elegit was the somewhat similar estate of a judgment creditor. The creditor while in possession pending payment was called tenant by statute merchant or statute staple or tenant by elegit respectively (see *MORTGAGE*).

We pass now to the second classification of estates, viz.—

II. Estates with reference to the time at which the enjoyment thereof begins—the obvious division being into present and future. Estates the enjoyment whereof is present are called (i.) estates in possession. Estates the enjoyment whereof is future are called (ii.) estates in expectancy. There cannot, however, be any estate in expectancy in an estate at will or at sufferance. Estates in expectancy are subdivided according to their origin. They may arise by operation of law; these are called *REVERSIONS*; or they may arise by agreement and act of parties; these are called *REMAINDERS*. A reversion and a remainder both arise upon the grant by an owner of a part only of his estate, the part thus granted is called the "particular" estate (*particula*, a small part, 2 Black. *Com.* 165). "The residue of the estate left in the grantor" (2 Black. *Com.* 175) is the reversion, arising purely by operation of law without any special reservation, whatever quantity is not granted remaining in the grantor. But if the grantor should at the time of the granting of the particular estate dispose of this remaining quantity or any part of it to some other person, then it is a remainder; for it has been expressly granted: it arises by an act of party. An estate in reversion is commonly called a reversion, and its owner a reversioner; the owner of an estate in remainder, a remainderman. Remainders are either *VESTED* or *CONTINGENT*. They are called vested if granted unconditionally to a living and certain person; contingent where the grant is conditional on the happening of an event, or the grantee unborn or uncertain; the condition precedent to their vesting (see *supra*, *Estates on Condition*) is the happening of the event, or the birth or certainty of the grantee (see *REVERSIONS*; *REMAINDERS*).

III. The last classification of estates is according to the number and connection of the tenants.

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|--|------------------------------------|
| 1. Severalty (<i>q.v.</i>), there being one sole tenant. | |
| 2. Joint tenancy (<i>q.v.</i>) | |
| 3. Coparcenary (see <i>PARCENERS</i>) | } there being two or more tenants. |
| 4. Tenancy in common (<i>q.v.</i>) | |

[*Authorities*.—Stephen, *Commentaries of the Laws of England*, 11th ed., vol. ii.; Williams, *Real Property*; and see Edwards, *Compendium of the Law of Property in Land*, Part I. ch. ii. "Estates generally."]

Estates by Estoppel.—It is an old-established principle of English law that no man can dispute his own "solemn" deed (see *General Discount Co. v. Liberator Building Society*, 1878, 10 Ch. D. 15, and the old cases there cited, and see also article ESTOPPEL), and from this doctrine it follows that if A. grants to B. premises to which at the time of his so granting them he has no title, A. and all persons claiming through or under him is and are estopped from disputing B.'s title under the grant. And further, B. likewise is estopped from denying A.'s title at the time of the grant. B.'s estate is called an estate by estoppel. Such an estate is not good as against third parties, and as against A. and persons claiming through or under him good only for the term limited by the grant.

If, however, any actual estate or interest is subsequently acquired by A., or any person claiming through or under him during the continuance of the term in B. and his assigns, the interest so acquired is said to "feed" the estoppel. That is to say, any beneficial interest acquired by the grantor and those claiming through or under him goes to enrich, or enures for the benefit of, the estate by estoppel originally acquired by the grantee, and the estate by estoppel becomes an actual beneficial interest, good as against all parties to the extent of such acquired beneficial interest (*Doe d. Christmas v. Olwes*, 10 Geo. IV. 5 Man. & Ry. 202; 2 Smith, L. C. 706).

For the creation of an estate by estoppel the assurance must be by indenture, not by deed poll or by parol (*Co. Lit.* 47 b.).

The general rule, that an interest accrued "feeds" the estate by estoppel, is subject to the exception expressed by the words, "There can be no estoppel where an interest passes." That is to say, if A. in the previous example, instead of having no interest whatever in the premises, has at the time of the grant any estate or interest whatsoever, no matter how far short of the estate or interest he professes to grant, such grant takes effect not by way of estoppel but by way of interest, and though A. subsequently acquire the reversion, not only does it not pass to B., but it is open to either A. or B. to avoid the grant and dispute each other's title (see *Langford v. Selmes*, 1857, 3 Kay & J. 220). But the mere fact that a person purports to deal with the whole of an estate, when, in fact, he can only deal with a part of it, does not exclude the operation of the doctrine of estoppel; the rule that there is no estoppel where an interest passes referring to the duration not to the compass of the interest; and where one of several coparceners made a lease of the whole of certain gavelkind lands, and the tenant entered under the lease and paid rent as for the whole to the coparcener until his death, the tenant was estopped from denying that the heir and privy in blood of the lessor coparcener was entitled to the whole of the land (*Weeks v. Birch*, 1894, 69 L. T. 759).

Given a demise or other assurance, which is good by way of estoppel, a reversion by way of estoppel is created in the grantor, and the reversionary estate by estoppel is *prima facie* an estate in fee-simple (*Sturgeon v. Wingfield*, 1846, 15 Mee. & W. 224).

The Courts of equity have shown themselves anxious from time to time to restrict this doctrine of estates by estoppel and its branches, being reluctant "to extend a doctrine by which falsehood is made to have the effect of truth." Accordingly they have held that an estate by estoppel

cannot be fed by an interest which has been acquired fraudulently (*Heath v. Cretlock*, 1874, 10 L. R. 10 Ch. 22; *Keate v. Phillips*, 1881, 18 Ch. D. 560). The fact that a man commits a fraud with regard to an estate has therefore not been allowed to bind that estate. Cp. also the judgments of the Court of Appeal in *Onward Building Society v. Smithson*, [1893] 1 Ch. 1).

Another important doctrine in connection with estates by estoppel should be noticed, viz. that when one person takes an estate under an instrument from another having no title thereto, he takes such estate subject to the estoppel that he and his privies is and are excluded from disputing the validity of the instrument; so that where a tenant by the curtesy (see CURTESY) devises the premises to trustees to A. for life, with remainder to B., A. having entered under the will is estopped from setting up a possessory title, disputing the validity of the will as against the remaindermen (*Board v. Board*, 1873, L. R. 9 Q. B. 48). This doctrine has been very recently recognised by the Court of Appeal and applied to deeds, and where a grantor who had no title purported by deed to convey land to a tenant for life with certain remainders over, and the tenant for life entered upon the land under the settlement and afterwards acquired a possessory title against the true owner, it was held that he and his privies were respectively estopped as against the remaindermen from disputing the validity of the settlement (*Dalton v. Fitzgerald*, [1897] 2 Ch. 86). See LANDLORD AND TENANT.

Estates for Life.—See LIFE, ESTATES FOR.

Estates of Inheritance.—An estate of inheritance is one that is—subject to the owner's powers of alienation—capable of devolving after the death of the owner, commonly called the ancestor, upon his heirs. When the inheritance devolves by its nature upon the ancestor's heirs generally, the estate is called an estate in fee-simple; when, however, the class of heirs to which the inheritance can devolve is limited to heirs begotten of the ancestor's body, the estate is called an estate in fee-tail or estate tail.

An estate in fee-simple is the greatest estate or interest in real property that the English law recognises in the subject; and it is its two salient features of descent and alienability that give it this high value and make it practically equivalent to absolute ownership.

The early division of estates in fee was into fees limited and fees absolute. Fees limited are either qualified or base fees (see BASE FEE), or fees conditional (see ESTATES). The fees conditional, that after the Statute *De donis conditionalibus* were called fees tail will be considered later on under estates tail. Fees absolute are the ordinary estates in fee-simple, and we will therefore proceed now to treat of these only, dealing with them under the main heads.

I. The acquisition of an estate in fee-simple.

II. The incidents (and therein of the alienation and devolution) of an estate in fee-simple.

III. The determination of an estate in fee-simple.

I. *The Acquisition.*—It was, until the passing of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), necessary to use some words of inheritance to enable a grantee to acquire the fee-simple by grant *inter vivos*, a gift to A. without further words conferring only a life estate. The

law, however, even before the passing of the Wills Act, 1837 (1 Vict. c. 26), allowed a greater latitude in the cases of gifts by will, and allowed the presumption that the testator meant only to give a life estate to be rebutted, if evidence could be gathered from the context of the will that the testator meant to give all the estate he died possessed of. The addition of such words as *in fee*, or *and his assigns for ever*, would be evidence of such an intention, in spite of the non-use of the word *heirs*. The fee-simple would also pass if the testator used the word *estate* or an equivalent expression capable of describing the extent of the testator's interest as well as the substance of the gift. But to have this effect such expression must be used in the operative part of the devise (see *Doe v. Clayton*, 1806, 8 East 141; *Burton v. White*, 1847, 1 Ex. Rep. 526). The old law previously to the Wills Act and this latter principle has been recently considered in *Hill v. Brown*, [1894] App. Cas. 125, a case on appeal from New South Wales and decided on the old law as before the Wills Act.

Now the presumption of law is the converse, for by the Wills Act, where any real estate is devised to any person without any words of limitation, such devise is to be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will unless a contrary intention appear. And as to gifts *inter vivos*, the Conveyancing Act, 1871 (s. 51), enacts that it shall be sufficient in the limitation of an estate in fee-simple to use the words *in fee-simple* without the word *heirs*.

The question of what words will pass an estate in fee-simple and also the rule in Shelley's case will be found treated at greater length under **HEIRS; HEIRS OF THE BODY**.

We have spoken of the acquisition and transfer, and not of the creation of estates in fee. For, except from the Crown, who as lord paramount can create an estate in fee *de novo* (as *e.g.* where lands have escheated to the Crown), no such estate can now be acquired otherwise than by transfer, this being the natural result of the abolition of subinfeudation in 1290 by the Statute of "Quia Emptores." The enactment is to the effect that henceforth every free man should sell at his own pleasure his lands, or any of them, "so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and customs as his feoffor held before." And the rights of the Crown not being mentioned the Crown is not affected by the enactment. In other words, all estates in fee granted *by the subject* must have either been *in esse* in 1290, or, if created since, must have been created by the Crown. In the case of copyholds, the lord of the manor stands in the same position to his tenants as the Crown to the subject, hence the principle laid down by Blackstone, that it being essential to a manor that there should be tenants holding of the lord, all manors now existing must have existed as early as the reign of Edward I. But the principle as stated is probably too wide, and might be qualified by the addition of some such words as, "unless created by the express licence of the Crown," for instances are to be found of charters granted by the Crown and confirmed by Parliament later than the date mentioned authorising the creation of a manor *de novo*. See **COPYHOLD**; and Challis, *R. P.*, 2nd ed., p. 21, and *Delacherois v. Delacherois*, 1864, 4 N. R. 501; 11 H. L. 62, where proof was given of a manor created *de novo* in the time of Charles I. by virtue of letters patent from the Crown.

II. Incidents.—To treat at any length of the incidents of an estate in fee-simple would be to treat of the greater part of the Law of Real Property, and it is not intended therefore to do more than to lead up to

the main heads from which the subject may be pursued in greater detail by referring to the articles under the various titles and to some of the latest cases. It may be said generally that the tenant in fee-simple has, as to the use, enjoyment, and alienation of his estate, the uncontrolled powers of an absolute owner so long as he does not infringe the rights of others, or act against public policy. The maxim "*Sic utere tuo ut alienum non laedas*" applies to this as to every other right of ownership.

The right of alienation has been of gradual growth: at first the tenant could not alienate at all without the lord's consent; the Statute "*Quia Emptores*," however, recognised, by the section already quoted, the power of each man to sell at his own pleasure. But it was not till long after, that the power of testamentary disposition was given, namely, by the passing of the Statute 32 Hen. VIII. c. 1, a power which was enlarged by the Statute 12 Car. II. c. 24, that abolished feudal tenures.

The right of alienation, whether *inter vivos* or by will, is, like the right of use and enjoyment, subject to compliance with certain requirements and rules that the law imposes; and these refer both to the legal capacity to exercise and acquire the rights that the estate *primarily* confers, and to the mode of exercising the right itself.

These requirements may be classified in accordance with their reference to—

1. *The Person alienating*.—He or she must not be under a disability, *i.e.* infants, married women and lunatics are subject to certain restrictions (see INFANTS; HUSBAND AND WIFE; IDIOT; LUNACY). Restrictions are also imposed on the alienation of lands by corporations; and on the alienation of Crown lands by the Crown (1 Anne, c. 7); and see CORPORATION; CROWN, LAND REVENUES OF.

As to the old law before the Forfeiture Act, 1870, affecting the rights of felons to acquire, hold, or alienate lands, see FELON.

2. (a) *The Mode and* (b) *the Operation of the Transfer*.—The mode of disposition required by law differed originally according to whether the hereditaments were corporeal or incorporeal: for the history of the law on this point, see CORPOREAL HEREDITAMENTS; INCORPOREAL HEREDITAMENTS.

Suffice it to say here that now, since the passing of the Real Property Act, 1845 (8 & 9 Vict. c. 106), the mode of disposition required by the law is by deed; and as to lands to which the Middlesex and Yorkshire Registry Acts apply, it is further necessary to register a memorial of the deed (see REGISTRATION).

Not only must the transfer of the property be according to law, but it must not in its operation contravene the rules of law. Such are the rule against "a possibility or possibilities," the rule against perpetuities, and the rules against limitations of freehold estates in future (cp. the case of *Cadell v. Palmer*, 1833, 1 Cl. & F. 372; 10 Bin. 140; *In re Frost*, 1890, 43 Ch. D. 246; *Whitby v. Mitchell*, 1890, 44 Ch. D. 85; and see PERPETUITIES; REMOTENESS; EXECUTORY LIMITATIONS).

3. *The Alienees, i.e., who may acquire and enjoy Lands*.—It was from the earliest times looked upon as contrary to the interests of the lord, and subsequently as contrary to public policy, to allow the alienation of lands to corporations, sole or aggregate, called "alienation in mortmain." The result of the doctrine was the series of statutes known as the Statutes of Mortmain, and the modern Mortmain Acts (see MORTMAIN). The law in this respect, as it now stands by virtue of the Mortmain and Charitable Uses Acts, 1888 and 1891 (51 & 52 Vict. c. 42; and 54 & 55 Vict. c. 73), is that no lands shall be assured to, or for the benefit of, or acquired by, or

on behalf of any corporation, unless under the authority of special licence from the Crown, or of a statute for the time being in force. The most important instances in which such authority has been given by statute are in the cases of alienation to (a) incorporated charities with the consent of the Charity Commissioners; (b) joint-stock companies; (c) companies incorporated under the Companies Acts, 1862-90 (subject, however, in the case of companies formed for promoting religious, literary, or kindred objects not involving the acquisition of gain, to consent by the Board of Trade, if the land is more than two acres); (d) certain poor benefices, cp. QUEEN ANNE'S BOUNTY; (e) District, County, and Parish Councils (by virtue of the Public Health Act, 1875, and the Local Government Acts, 1888 and 1894); (f) public schools, parks, museums, etc. (by virtue of express exemption in the Mortmain Act of 1888); (g) public libraries (by virtue of the Public Libraries Act, 1892; the land in this case not to exceed one acre); (h) technical and industrial institutions (Technical and Industrial Institutions Act, 1892). The principle that led to the restriction of alienation in mortmain led also to the restriction of two other analogous classes of alienation, viz. alienation made for charitable purposes in view of approaching death and alienation to superstitious uses. To cope with the former evil the Statute of 9 Geo. II. c. 36 was passed, the object of which the preamble describes as being to prevent improvident alienations by dying persons to the disinherison of their lawful heirs. The history of the law on this subject will be found treated at length under CHARITIES. The present law is embodied in Part II. of the Mortmain and Charitable Uses Act, 1888, which repeals the Act of George II. To be valid, the assurance must take effect in possession immediately, without power of revocation or reservation of any sort for the grantor, and those claiming under him, other than a nominal rent, mines, easements, or stipulations as to the character of the estate and right of entry for breaches and other conditions of a like nature. The conveyance must be by deed executed before two witnesses, and (unless for value) executed twelve months before death of the grantor, and in any case to be enrolled six months after execution. As in the case of corporations, there are several important exemptions from the general rule, and some of these have already been noticed above in dealing with exempted corporations; we may add to those above, the Universities and certain of the Colleges, and to take a more recent exemption introduced by the Working Classes Dwellings Act, 1890, assurances of lands to provide dwellings for the working classes.

It follows from the stringent provisions of the Mortmain Acts, that no testamentary disposition in favour of any other than the exempted charities could hold good. And it was not until the Mortmain and Charitable Uses Act, 1891, that validity was given to such disposition by will, the Act providing that any assurance of land for charitable uses made by the will of a testator dying after the passing of the Act shall be valid and effectual, but the land must be sold within a year. Power, however, is given to the Court or Charity Commissioners to extend the time within which the land is to be sold, or to allow part of it to be retained for actual occupation for the purposes of the charity; and see the recent cases of *In re Bridge*, [1893] 1 Ch. 44; [1894] 1 Ch. 297; *In re Hume*, [1895] 1 Ch. 422, as to the effect and operation of the Act.

Gifts to superstitious uses have always been invalidated by the law on the grounds of public policy; the line that divides these latter from gifts to "charitable purposes," in the legal acceptance of the term, is sometimes difficult to draw; the shortest definition is that recently laid down: "To

be a charity, there must be some public purpose—tending to the benefit of the community” (cp. *In re Foveaux*, [1895] 2 Ch. 501).

We have not attempted to treat otherwise than very generally of the above principles; the subject will be found in detail under CORPORATION; CHARITIES; SUPERSTITIOUS USES; MORTMAIN.

Alienation to, and the holding by, aliens of land was at one time restricted on similar grounds. *Aliens*, until the passing of the Naturalisation Act, 1870 (and see 58 & 59 Vict. c. 43), were incapable of holding land, and could therefore not be the objects of valid alienation, their land being liable to forfeiture; the Act, however, provides by sec. 2, that real and personal property may be acquired, held, and disposed of by an alien in the same manner, in all respects, as natural-born British subjects. See ALIEN.

4. *Alienations Defeating prior Rights*.—The rights defeated by alienation, unless restricted, may be—

(a) The rights of the alienor’s husband, viz. curtesy;

(b) The rights of the alienor’s wife, viz. dower. On both of these see HUSBAND AND WIFE;

(c) The rights of creditors.

These rights of others may be affected by alienation fraudulently *inter vivos*, or by testamentary disposition. As to testamentary disposition, we will only say here that till 1807, unless a debtor had by bond or deed actually bound his heirs or charged his lands by will with payment of his debts, his simple contract creditors had no remedy against his lands.

In 1807 (by 47 Geo. III. c. 74), the lands of deceased traders were made liable for all their debts; but it was not till 1833 (by 3 & 4 Will. IV. c. 104) that any liability attached to lands of deceased non-traders in respect of simple contract debts. For the various rights of creditors by specialty, and creditors by simple contract, see EXECUTION, *Elegit*; and as to alienations *inter vivos*, for the purpose of defrauding creditors, and the way in which the law has dealt with them, see FRAUDULENT CONVEYANCES.

Of the Devolution of an Estate in Fee-simple.—In default of the powers of alienation being exercised by the owner, *inter vivos*, or by will, the estate devolves upon the heirs according to certain laws of descent; these will be found under INHERITANCE. The devolution is subject to the rights of dower or curtesy above noticed, as the case may be, and subject also (where the owner is a married man, leaving a widow and no issue) to the provisions made for the widow’s benefit by the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29); and see *In re Charriere*, [1896] 1 Ch. 912.

III. *The Determination of an Estate in Fee-Simple*.—On the death of the owner intestate, and leaving no heirs, the estate, not having been alienated, reverts or escheats to the lord, and, as has been said, the lord paramount being the Crown, it is to the Crown that the land reverts. The most frequent cause of escheat is bastardy of the owner of the estate; for a bastard being *nullius filius*, if he has no issue can have no heirs (see ESCHIEAT).

We pass now to the consideration of the other class of estates of inheritance, viz:—

Estates Tail.—These have already been defined. They may be created either by grant *inter vivos*, or by will. The mode of such creation, and the words necessary for such creation to be valid, together with the statutory change now introduced by the Conveyancing and Law of Property Act, 1881, are all dealt with in another part of this work under HEIRS; HEIRS OF THE BODY. The incidents of these estates are, except as already mentioned, generally the same as those of estates in fee-simple. But although now, with the exceptions that will be hereafter noticed, tenants in

tail (as the owner of an estate tail is called) have almost as large powers of alienation as tenants in fee-simple, such powers are of recent origin, and the law as it now stands cannot be well explained or understood without reference to the history of the gradual rise of such power of alienation, or in other words, the history of estates tail. And at the risk of sacrificing logical order, we will consider the way in which the various classes of estates tail determine, in order the better to understand the various interests to which the power of alienation was and is opposed.

The primary division of estates tail is into tail *general* and tail *special*, and this division has reference to whether the inheritance is limited to the issue generally, or to a class only of the issue of the tenant in tail, viz:—"To A. and the heirs of his body" gives A. the estate tail general; "To A. and the heirs of his body *by B.*" gives him an estate tail special, the inheritance being limited to a special class of his issue only (*i.e.* issue by B.). Besides this division, an estate tail, whether general or special, may be divided with reference to the sex (if any sex is specified) of the issue, *e.g.* "To A. and the heirs male of his body"; "To A. and the heirs *female* of his body"—called tail male and tail female respectively. Estates in frankmarriage, another species of estates tail, are dealt with under FRANKMARRIAGE.

If the estate tail has not been alienated, it is clear that, upon failure of the issue specified by the gift in any of the ways above mentioned, the estate will revert to the grantor, or go over to any other person to whom the grantor may have limited the estate after the failure of the issue so specified. Accordingly, by alienation the tenant in tail would prejudice (or, as it was said, *bar*) not only the issue, but the grantor and people claiming under him.

The origin of estates tail was one form of the conditional fees already mentioned—estates tail are but a statutory modification of qualified fees. If A., the donor, granted an estate to B. and the heirs of his body, the construction of the gift by common law was that it was a grant of the fee to B. *conditionally* on his having issue. So that once B. had issue, the condition being performed, the grantor was barred: the issue itself B. could bar by alienation at any time. The power of alienating these conditional fees was acquired, as and when the power to alienate any other fee-simple estate; first as against the heirs or issue, afterwards as against the lord or grantor. It was apparent, however, that this alienation was contrary to the intention of the donor, and the Statute *De donis conditionalibus* was passed to provide the necessary remedy in 1285 (13 Edw. 1. c. 1, called also Statute of Westminster the Second). The statute provided that the will of the donor as expressed in the form of the gift (*secundum formam in carta doni*) should be observed, and that lands given to a man and the heirs of his body (or any like form of entail) should notwithstanding any alienation of the tenant in tail go to his issue, or failing the issue, revert to the donor or his heirs. The statute, therefore, not only protected the issue and the donor, but gave the latter a clear vested interest in the reversion or fee-simple, instead of what before was a mere possibility, "For in every gift in tail without more saying the reversion was in the donor" (*Co. Lit.* 22 a).

The restrictions introduced by the statute endured for 200 years before the methods that were resorted to, to evade its provisions were recognised by a decision of the Courts; and it is strange that the Crown should have been the primary cause of the change, for "Edward IV., observing in the disputes between York and Lancaster how little effect attainder for treasons had on families whose estates were protected by the Sanctuary

of Entails, gave his countenance to this proceeding, and allowed *Taltarum's* case to be brought before the Court" (2 Black. Com. 117). Estates tail were not then liable to forfeiture beyond the life of the tenant in tail; besides this, the facility they afforded for defrauding creditors, purchasers, and lessees, had made them generally looked upon as a mischief. "When all estates were fee-simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lord had their escheats. . . ; and what contentions and mischief have crept into the guilt of the law by these fettered inheritances daily experience teaches us" (Coke on *Litt.* 196; cp. also 370 b, and *Mildmay's* case, 6 Ca. 40 a, for like expressions of opinion. *Taltarum's* case will be found at length in Challis, *R. P.*, 2nd ed., 280; Tudor's *Leading Cases*, *R. P.* 695 (Year Books, 1472, 12 Edw. iv. 19). The effect of the case was to clearly establish the principle that a common recovery suffered by a tenant in tail barred both the issue and the donor, *i.e.* converted the estate tail to an estate in fee-simple. The origin, nature, and effect of these collusive actions is described under RECOVERIES. An estate tail could also be barred by another kind of collusive action, called a fine; this device, however, served only to bar the claims of the issue, and did not affect the rights of reversioners or remaindermen, whose estates were expectant on the determination of the estate tail. The estate thus created was called a BASE FEE (*q.v.*). It is for this reason that as a means of barring entails common recoveries were in more frequent use than fines.

An estate tail could not be barred by recovery unless in actual possession; but it could be so barred by a fine, the latter operating as soon as the estate came into possession. Accordingly, where a tenant for life was in possession, the expectant tenant in tail could not bar by common recovery without obtaining the consent of such tenant for life to the proceedings; so that if such consent was not given, the tenant in tail could not do more than create a base fee by levying a fine, thus barring his issue only. For the nature and effect of fines, see FINES.

The right of the tenant in tail has, however, always been subject to the restriction that he cannot bar after "possibility of issue extinct." There is no age, no matter how advanced, at which the law presumes a man to be incapable of having issue; but by reference to the classification above of estates tail, it will be seen that in a case of an estate tail special, the death of, *e.g.*, the wife on whom the specified issue is to be begotten, would preclude the possibility of such issue ever coming to existence. The possibility of such issue is said to be extinct. On such extinction the estate tail becomes in the eyes of the law, and is treated by the Settled Estates Act, 1877, and the Settled Land Acts, 1882 to 1890, as an estate for life, and the tenant cannot bar the entail. A tenant in tail *special* is the only tenant in tail who is thus liable by reason of possibility of issue extinct to be deprived of his right of barring the entail.

Fines and recoveries were abolished in 1833 by the Act (3 & 4 Will. iv. c. 74) entitled An Act for the Abolition of Fines and Recoveries, and for the Substitution of more Simple Modes of Assurance. The Act empowers any actual tenant in tail (*i.e.* the tenant of an estate tail which shall not have been barred) to dispose of or acquire the estate tail as an estate in fee-simple, as against all persons claiming by force of any estate tail which might be vested in or might be claimed by the person making the disposition; and also against all others, including the Crown, whose estates are to take effect after the determination or in defeasance of the estate tail (s. 18); also to enlarge base fees into fee-simple (s. 19), saving in each case,

however, the rights of all persons in respect of estates prior to the estate tail.

The power of disposition conferred by the Act is expressly made not to extend to—

(1) Estates tail granted by the Crown as a reward to the subject by 34 & 35 Hen. VIII. c. 20, or any other Act restraining tenants in tail from barring their estates and reserving the reversion to the Crown. (These could not have been barred before the Act against either the heirs or the reversioners.)

(2) Estates tail after possibility of issue extinct.

(3) The estate of a woman tenant in tail *ex provisione viri* under 11 Hen. VIII. c. 20, except with such consent as in the said Act (11 Hen. VIII. c. 20) mentioned. These are now obsolete.

In the same way as for a recovery to be effectual, it was necessary to obtain the consent of the person in actual possession if the estate tail was in remainder only, the Act provides that the owner of the first existing estate, under a settlement prior to the estate tail under the same settlement, shall be the person whose consent is to be obtained to effectually bar an estate tail not in possession. He is called the Protector of the Settlement; and without his consent, where necessary, the issue alone can be barred. For a detailed definition of Protector and a detailed consideration of the law on this part of the subject, see PROTECTOR OF THE SETTLEMENT. Powers are also given to tenants in tail to confirm voidable estates (s. 38). As to base fees (s. 39), it is provided that if they be at any time united in the same person with the immediate reversion or remainder, the base fee shall not merge, but be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector (if any), might have created by any disposition under the Act if such remainder or reversion had been vested in any other person. The disposition may be made by the tenant in tail by deed, as if he were seised in fee, but not by will or contract; nor is any special form of deed necessary, so long as it is such a deed as would operate to pass the fee-simple. It must be added that, although a contract to convey the estate tail as a fee-simple does not operate to convey the fee, specific performance of such a contract will be enforced as against the tenant in tail (see *Banker v. Small*, 1887, 36 Ch. D. 716).

But any testamentary disposition or contract not completed will be bad both as against the issue and reversioners or remaindermen (see *Green v. Paterson*, 1886, 32 Ch. D. 95).

The disentailing assurance to be operative must be enrolled within six calendar months, as must the protector's consent, given either by the same deed as the assurance or one executed previously thereto. The enrolment should be in the central office of the Supreme Court.

But apart from the provisions of the Fines and Recoveries Act, powers of alienation, without, however, barring the entail, have been given to tenants in tail by recent statutes; tenants in tail in possession have the power of sale, leasing, and exchange of tenants for life under the Settled Land Acts. But this part of the subject belongs more strictly to the treatment of the said Acts (see SETTLED LAND ACTS).

As to the liability of estates tail for the debts of the tenant in tail after his decease, see the references given above in the case of the liability of estates in fee-simple.

When an estate *pur autre vie* (see LIFE, ESTATES FOR) is given to A. and the heirs of his body, the estate, so long as it continues, devolves as an estate tail, and is called a "quasi-entail." The owner in possession of such

an estate may alienate so as to effectually bar the issue and also the remaindermen without complying with the provisions of the Fines and Recoveries Act; if not in possession, he cannot bar the remaindermen without the consent of the tenant for life (*Edwards v. Champion*, 1853, 3 De G., M. & G. 202).

In dealing with estates tail, we have as yet disregarded copyholds. We may add very shortly that where estates tail exist in copyholds, they exist by special custom only. For, as the right of alienation was recognised very much later in copyholders than in freeholders where an estate was given to a copyholder and his heirs, it was a question of the custom of the manor whether the estate was to be treated as a conditional fee alienable on birth of issue, or inalienable altogether. The conditional fees remained; the inalienable became in many cases by custom, entails; the lord seeing the mistake of an entail much in the same way as the Crown saw the loss it sustained as already mentioned, allowed the copyholder to disentail by a customary recovery analogous to the common recovery. Collusive forfeitures followed by regrants in fee-simple from the lord were also used in certain manors. The result is curious; for the copyholder of a manor in which originally a custom to entail existed could effectually bar by the methods mentioned both issue and remaindermen. On the other hand, the copyholder of a manor, in which gifts in tail were treated as fees conditional on the birth of issue, could only alienate if he had issue born. By the Fines and Recoveries Act, a conveyance by surrender is made the effectual way of barring an estate tail in copyholds, similar provisions being made as to consent by the protector, as in the case of freeholds. The protector's consent, if by separate deed, is entered on the Court rolls of the manor; if not given by separate deed, evidence of the protector's consent to the surrender should be preserved in the Court rolls (ss. 51 and 52). For a detailed treatment of the subject, see COPYHOLD.

[*Authorities.*—See Challis, *Real Property*, 2nd ed.; Goodeve, *Modern Law of Real Property*, 4th ed.; Williams, *Principles of the Law of Real Property*, 18th ed.]

Estates of the Realm.—The three estates of the realm are the clergy, the nobility, and the commons. In Parliament they are organised in two Houses—the House of Lords (*q.v.*) and the House of Commons (*q.v.*). The estate of the nobility are summoned in person to the House of Lords, with the modern exception of Scotch and Irish peers, who appear there by their representatives. The estate of the commons appear by their representatives in the House of Commons. The estate of the clergy is still in theory represented in both Houses, but, as regards the Lower House, this representation has been a mere fiction for centuries. In the House of Lords the bishops of the five principal Sees sit of right, and a limited number of the other bishops, according to seniority. Before the Reformation abbots and priors holding by barony were also liable to summons. The writ summoning a bishop to Parliament still contains the *præmunientes* clause, requiring the bishop to cause the archdeacon, a proctor chosen by the chapter, and two proctors chosen by the rest of the clergy to be present in Parliament. The representatives of the lower clergy appeared intermittently and reluctantly in Parliament, and from the end of the fourteenth century their attendance entirely ceased. (See CHURCH OF ENGLAND.) It should be mentioned that the assent of the bishops has not been held necessary to the

validity of Acts of Parliament, *e.g.* the Act of the Long Parliament, which excluded them, and the Act of the Restoration Parliament, which restored them. (See Pike, *Constitutional History of the House of Lords*, p. 326.)

The Crown is not itself an estate of the realm, but shares the sovereignty with the parliamentary assembly of the three estates. The division of the community into three orders was common to Western Europe in mediæval times, but there was much difference in the lines of division, and as to the way in which the three estates were organised in their assemblies. In England the estate of the nobility was restricted to the small number entitled to an hereditary summons to Parliament; in France it included the minor tenants in chief who in England are represented in the House of Commons. In England it is confined to those actually entitled to a personal summons (unless disqualified by age or sex) and their wives. In France it formed an hereditary caste. In England the three estates are combined in two Houses, whereas in the French States-General each estate sat apart. As to the far-reaching consequences of these differences; see Stubbs, *Constitutional History*, ss. 184, 185.

Estimated; Estimation.—As to meaning of “estimated value,” see PARTICULARS OF SALE, and Stroud, *Jud. Dict.* As to “words of estimation,” see ABOUT; MORE OR LESS.

Estoppel.

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1. *Definition.*—An estoppel is an admission, or something which the law treats as an equivalent to an admission, of so high and conclusive a nature that anyone who is affected by it is not permitted to contradict it (*Co. Lit.* 352 *a*; 2 Smith, *L. C.*, 10th ed., p. 726, in the note to the *Duchess of Kingston's* case, cited below as *S. L. C.*). It is not of itself a cause of action. It is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying something which he has said (per Bowen, L.J., in *Low v. Bouverie*, [1891] 3 Ch. at p. 105).

2. *General Rules and Exceptions* (see *Co. Lit.* 352 *b*; *S. L. C.* p. 731).—There is no estoppel where the record, deed, or other document in which the statement relied on is contained shows the truth (unless it appears that the

parties concerned have agreed that the statement relied on shall bind them, as in the common mortgage attornment clause (*Morton v. Woods*, 1869, L. R. 4 Q. B. 293); nor if the statement is consistent with the matter set up, or is ambiguous or uncertain, for "every estoppel must be certain to every intent" (Coke, *ibid.*; *Low v. Bouverie*, [1891] 3 Ch. 82); nor if the party relying on the estoppel is estopped from doing so, for "estoppel against estoppel doth put the matter at large" (Coke, *ibid.*). And estoppels are, and must be mutual (see *Concha v. Concha*, 1886, 11 App. Cas. 541); so that where a defendant must admit the plaintiff to be his landlord, the latter is bound to the former by the landlord's covenants (*Hartcup v. Bell*, 1883, C. & E. 19).

No estoppel affords an answer to an objection resting on public policy, as a stamp objection (*Steadman v. Duhamel*, 1845, 1 C. B. 888), or an objection that an assignment is illegal (*Fairtitle v. Gilbert*, 1787, 2 T. R. 169; 1 R. R. 455; *Macallister v. Bishop of Rochester*, 1850, 5 C. P. D. 194; cp. persons with limited powers, below, 12.).

The technical estoppels, by record or deed, by which a man actually is or may be, as Lord Coke says, "concluded to say the truth," are strictly construed (*Bowman v. Taylor*, 1833, 2 Ad. & E. at p. 290). They are described as "odious" (*Palmer v. Ekins*, 1729, 2 Raym. (Ld.) at p. 1552), and not to be extended (*General Finance Co. v. Liberator Co.*, 1878, 10 Ch. D. at p. 24; *Onward Building Society v. Smithson*, [1893] 1 Ch. 1). But such dicta do not apply to estoppels *in pais*. These the Courts are inclined to extend, in particular estoppels arising out of mercantile transactions (S. L. C. p. 840).

Estoppels are divided into three groups: *A.* By Matter of Record; *B.* By Deed; *C.* "In Pais," *i.e.* by conduct.

A. BY MATTER OF RECORD.

The most important cases under this head are estoppels arising from the proceedings of Courts of justice. (As regards other records, see *Co. Lit.* 352 *a*, and Bigelow on *Estoppel*—cited below as "Bigelow," p. 37.)

3. *As a memorial of the proceedings* of an English Court, the record is absolutely conclusive against all the world while it stands, even though it is, in fact, mistaken (*R. v. Carlile*, 1831, 2 Barn. & Adol. 362; *Irwin v. Grey*, 1865, 19 C. B. N. S. 585; Bigelow, *ch. i.*), *e.g.* to show that a third person recovered a particular sum of damages against the plaintiff (*Green v. New River Co.*, 1792, 4 T. R. at p. 590). In such a case the judgment is not conclusive to show that the damages were properly recovered (*Pritchard v. Hitchcock*, 1843, 6 Man. & G. 2, 151; *Bullantyne v. Mackinnon*, [1896] 2 Q. B. 455). The remedy, if the judgment is erroneously entered, is to bring an action to set it aside, or to appeal against it, or to apply to the Court to amend it (Order 27, r. 15; Order 28, r. 11; *In re Swire*, 1885, 30 Ch. D. 239). As to an application by a third party, see *Jacques v. Harrison*, 1884, 12 Q. B. D. 165. The Court will not enforce a right arising upon the judgment, by injunction, if satisfied that the entry is incorrect (*Ward v. Moss*, 1894, 70 L. T. 178).

4. *As concluding the matter decided*, the general rule is that matters once decided by the final judgment of a Court of competent jurisdiction, whether it be a superior or an inferior Court (*Flitters v. Alfrey*, 1874, L. R. 10 C. P. 29), or by verdict in such Court (*Butler v. Butler*, [1893] Prob. 185; [1894] Prob. 25), shall not be called in question in subsequent proceedings between the same parties or between privies with them, or, if it is a "judgment *in rem*," in subsequent proceedings by anyone.

It makes no difference that new facts not before the Court when the previous decision was arrived at are suggested (*Shoe Machinery Co. v. Outlan*, [1896] 1 Ch. 667; but see *Heath v. Weaverham*, [1894] 2 Q. B. 108—a highway case).

5. *Exceptions*.—There is no estoppel where the former Court had no jurisdiction to determine the matter (*Duchess of Kingston's case*, S. L. C. 713; *Trinidad v. Eliche*, [1893] App. Cas. 518). But any judgment which on the face of it appears to be valid is *prima facie* presumed to be valid whether it is that of an English or a foreign Court (Dicey, *Conflict of Laws*, p. 412; *Alvon v. Furnival*, 1834, 1 C. M. & R. 277; *Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; see Bigelow, p. 204).

Nor unless the matter was necessary to be decided (see the *Duchess of Kingston's case*, *supra*, and *Concha v. Concha*, 1886, 11 App. Cas. 541), and the judgment was final (see *Nouvion v. Freeman*, 1887, 37 Ch. D. 244; 15 App. Cas. 1—a case of a foreign judgment).

Nor where the judgment was procured by fraud (see the judgment of De Grey, C.J., in *Girdlestone v. Brighton Aquarium Co.*, 1879, 4 Ex. D. 107; *Abouloff v. Oppenheimer*, 1882, 10 Q. B. D. 295; *Vadala v. Larves*, 1890, 25 Q. B. D. 310). The observations of James, L.J., in *Flower v. Lloyd*, 1878, 10 Ch. D. 327, have not been adopted (see *Abouloff v. Oppenheimer*, *supra*). A judgment by consent creates an estoppel, even though the consent was given under a mistake (*Joint Committee of the River Ribble v. Croston U. D. C.* [1896], 1 Q. B. 251). As to the case of judgments *in rem*, see further below, 6.

6. *Judgments "in rem," or having analogous effects*.—A judgment *in rem* is an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. "The very declaration operates on the status of the thing, and renders it such as it is thereby declared to be" (S. L. C. p. 734). No general rule for distinguishing such judgments can be laid down (see Bigelow, pp. 46 *et seq.*).

The following are or have the effect of judgments *in rem*: Judgments in Courts of Admiralty in causes of prize, or of salvage, or of forfeiture, or of any like nature over which such Courts have a rightful jurisdiction founded on the actual or constructive possession of the subject-matter (Blackburn, J., in *Castrique v. Imrie*, 1870, L. R. 4 H. L. at p. 428, citing Story); maritime lien (*l.c.*, *Minna Craig Co. v. Chartered Mercantile Bank*, [1897] 1 Q. B. 55, 460); condemnations of goods in the Exchequer (*Scott v. Shearman*, 1775, 2 Black. W. 977); the grant of probate or administration (*Concha v. Concha*, 1886, 11 App. Cas. 541), or an analogous decree as to title to succession in a foreign Court (*In re Trufort*, 1887, 36 Ch. D. 600), as regards the representation but not the domicile of the testator (*Concha v. Concha*, *infra*) or the effect of a will (*Whicker v. Hume*, 1858, 7 H. L. 124); and sentences of divorce or nullity (*Duchess of Kingston's case*, *supra*; *Scott v. A.-G.*, 1886, 11 P. D. 128) (as to the effect of a finding of adultery, see *Needham v. Bremner*, 1866, L. R. 1 C. P. 583); and local judgments as to title to foreign lands (*Plumer v. Woodbourne*, 1825, 4 Barn. & Cress. 625).

Such judgments *in rem* are conclusive against all the world (2 Co. Lit. 352 b, *ninthly*), but only as to points necessary to be decided and actually decided (*Concha v. Concha*, 1886, 11 App. Cas. 541; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455), and this, whether they are English or foreign judgments (*l.c.*, Dicey, *Conflict of Laws*, pp. 427–432), even though, in the latter case, they proceed on a mistake of English law (see below, 11.).

7. The exception of cases where the judgment was procured by fraud (see above, 5.) applies to judgments *in rem* (*Shaw v. Gould*, 1868, L. R. 3

H. L. 55; Story, *Conflict of Laws*, s. 592; Dicey, p. 406; per Blackburn, J., in *Castrique v. Imrie*, *supra*, L. R. 4 H. L. at p. 433), although the contrary was formerly held (*Castrique v. Behrens*, 1861, 3 El. & El. 709; see Bigelow, p. 254). But a grant by the Court of Probate cannot be questioned elsewhere on the ground of fraud (*Allen v. Macpherson*, 1845, 1 H. L. 191; *Meluish v. Milton*, 1876, 3 Ch. D. 27).

8. *Judgments "in personam."*—Parties and privies only are bound by such judgments. "Parties" include persons who had a right to control the proceedings, adduce and cross-examine witnesses, and bring an appeal if any appeal lay, and no others (Bigelow, p. 114; see per De Grey, C.J., in the *Duchess of Kingston's* case, S. L. C. 713), and they are bound only when suing in the same capacity (*Leggott v. G. N. Rwy. Co.*, 1876, 1 Q. B. D. 599; *Metters v. Brown*, 1863, 1 H. & C. 686). "Privies" (*Co. Lit.* 352 a) include all persons who succeed to the position of a party, or hold in subordination to his rights (Bigelow, p. 142), e.g. husband and wife succeeding to the wife's land before 1883 (*Outram v. Morewood*, 1803, 3 East, 346; 7 R. R. 473). But the person estopped must claim through the party, not independently (*Spencer v. Williams*, 1871, L. R. 2 P. & D. 230), and by a title acquired after the judgment (*In re Burgo's Estate*, 1896, 1 I. R. 274). The Court has refused to allow a beneficiary under a will, after accepting the benefit of a decision upon it, to which he was not a party, but of which he was fully cognisant, to dispute the construction adopted (*In re Lart*, [1896] 2 Ch. 788). See ADMISSIONS, vol. i. p. 150.

9. A judgment against one debtor upon a joint debt merges the debt, and a joint debtor cannot afterwards be sued upon the same cause of action (see *Kendall v. Hamilton*, 1879, 4 App. Cas. 504). In *In re Deeley's Patent* ([1895] 1 Ch. 687) it was held that the finding in a previous action between the petitioner and the patentee, that a patent was bad, did not estop the latter upon a petition for revocation, since the petition was presented on behalf of the public.

10. *When the Judgment or Verdict is binding.*—The matter must have been directly in point in the former case (*Duchess of Kingston's* case, *supra*), otherwise it is immaterial that a decision was pronounced upon it (*Concha v. Concha*, *supra*), and the former decision must have been in respect of the same cause of action. Thus judgment for damage to property is no bar to action for personal injuries arising out of the same accident (*Brunsdon v. Humphrey*, 1884, 14 Q. B. D. 141; *Daly v. Dublin, etc., Rwy. Co.*, 1892, 30 L. R. Ir. 514).

If a verdict is relied on it must have comprised a finding on the same question, whether the cause of action in the case was the same or not (*Outram v. Morewood*, 1803, 3 East, 346; 7 R. R. 473; *Marriott v. Hampton*, 1797, 7 T. R. 269; 4 R. R. 439).

A judgment in his favour in proceedings in which the plaintiff could not get complete relief does not estop him from suing again (*Nelson v. Crouch*, 1863, 15 C. B. N. S. 99; *Gibbs v. Cruikshank*, 1873, L. R. 8 C. P. 454; see S. L. C. pp. 745, 746). So a defendant who has counterclaimed in a County Court for a sum beyond its jurisdiction can afterwards sue in the High Court for the excess, and the plaintiff in the original action will be estopped from disputing the cause of action (*Webster v. Armstrong*, 1885, 54 L. J. Q. B. 236; see now Judicature Act, 1884, s. 18).

The better opinion is that a defence which might have been raised, but which was not before the Court, for instance, a set-off or counterclaim, is not concluded by the judgment (see Bigelow, pp. 158 *et seq.*; S. L. C. p. 744; *Davis v. Hedges*, 1871, L. R. 6 Q. B. 687; *Caird v. Moss*, 1886, 33 Ch. D. 22, but

(see *In re Hilton*, 1892, 67 L. T. 594), for the judgment is not even evidence of any matter which came only collaterally in question, or was incidentally cognisable, or of any matter to be inferred by argument from it (per De Grey, C.J., in the *Duchess of Kingston's case*, *supra*).

A judgment by consent or default (*In re South American and Mexican Co.*, [1895] 1 Ch. 37) is as binding as any other, and (semble) whether the Court had jurisdiction or not (*Joint Committee of River Ribble v. Croston U. D. C.*, [1897] 1 Q. B. 251). As to setting aside such a judgment, see *Huddersfield Banking Co. v. Lister & Son*, [1895] 2 Ch. 273; and *Ainsworth v. Wilding*, [1896] 1 Ch. 673.

11. *Foreign and Colonial Judgments "in personam."*—Any such judgment has the same effect as an English judgment, if pronounced by a Court of competent jurisdiction, not acting contrary to natural justice (e.g. in the absence of and without notice to the defendant, *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155), even though it proceeded upon a mistake as to English law (*Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; *Castrigue v. Imrie*, 1869, L. R. 4 H. L. 414; *Godard v. Gray*, 1870, L. R. 6 Q. B. 139; Bigelow, ch. vi.; Dicey, *Conflict of Laws*, ch. xvi.). See FOREIGN JUDGMENTS.

B. BY DEED.

12. *General Rule.*—Where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (per Taunton, J., in *Bowman v. Taylor*, 1834, 2 Ad. & E. at p. 291). Thus a covenantor for title cannot deny the covenantee's title (*Goodtitle v. Bailey*, 1777, Cowp. 597), and a party to a deed cannot, as against another party, dispute a statement recited by him as a fact in the deed (*Bowman v. Taylor*, *supra*; *General Finance Co. v. Liberator Co.*, 1878, L. R. 10 Ch. 15). In the last case the recital must be direct and unambiguous. So that neither words of grant, nor covenants for title, nor any recital in general terms,—as that a vendor "is entitled,"—is effective to raise an estoppel as to a particular fact not expressly stated, for instance, the fact that the party reciting had the legal estate (*l.c.*, *Right v. Bucknell*, 1831, 2 Barn. & Adol. 278; Dart, *Vendors and Purchasers*, 6th ed., p. 911), nor is the recital of a series of deeds and events, the effect of which would be to bring such estate to him (*Onward Building Society v. Smithson*, [1893] 1 Ch. 1). The question whether a recital is the statement of one or the other party, or of both, is one of construction (*Stronghill v. Buck*, 1850, 14 Q. B. 781).

A deed creates no estoppel in matters collateral to its purpose, though any recital or statement in it is evidence against the party reciting or making the statement (*Frazer v. Pendlebury*, 1861, 31 L. J. C. P. 1; *Carter v. Carter*, 1857, 3 Kay & J. 617). In the first cited case a mortgagor, who was a party to an assignment of the mortgage, which recited that a sum paid was due under it, was held not to be estopped by the deed in an action to recover part as an over-payment.

A person with limited powers cannot do indirectly by estoppel what he cannot do directly by grant or covenant (*Fairtitle v. Gilbert*, 1787, 2 T. R. 169; 1 R. R. 455; *Chambers v. Milford, etc., Rury. Co.*, 1864, 5 B. & S. 588; *Ex parte Watson*, 1888, 21 Q. B. D. 301); e.g. a married woman who is restrained from anticipation (*Bateman v. Faber*, [1897] 2 Ch. 223).

A party making his title under one who would have been estopped is bound by the estoppel (*Taylor v. Needham*, 1810, 2 Taun. 278; 11 R. R. 572; *Doe v. Stone*, 1846, 3 C. B. 176; *Clemont v. Geach*, 1870, L. R. 6 Ch. 147). But a party who has obtained the property conveyed by the deed from a

stranger to it, is not estopped (*Doe v. Errington*, 1839, 6 Bing. N. C. 79), nor is a party to a conveyance estopped by recitals in other deeds through which the title to the land conveyed is derived, at any rate in an action respecting other land (*Doe v. Shelton*, 1835, 3 Ad. & E. at p. 283).

A stranger to a deed cannot avail himself of an estoppel arising under it (*In re Ghost's Trusts*, 1883, 49 L. T. 588). Since a successor to the interest of a party who could have relied on the estoppel can himself do so (e.g. a reversioner, *Cuthbertson v. Irring*, 1859, 4 H. & N. 742; 6 H. & N. 135), and estoppels are mutual, the successor is bound by it (*l.c.*, *Hartcup v. Bell*, 1883, C. & E. 19). See generally as to estoppel by recitals, Elphinstone on *Deeds*, p. 140.

13. *A deed obtained by fraud* is, of course, no answer to a claim against the fraudulent party, and probably an innocent purchaser claiming through him cannot rely upon an estoppel arising under it, as against the party deceived (see *Onward Building Society v. Smithson*, [1893] 1 Ch. 1).

Relief may be had in equity against a deed executed by fraud or mistake which would otherwise create an estoppel, e.g. a release (*Brooke v. Haymes*, 1868, L. R. 6 Eq. 25).

14. *Title by Estoppel*.—If a grantor has at the time of the grant no estate sufficient to support it, but is estopped from denying as against the grantee that he has such estate (as to which, see above), and he afterwards acquires an estate in the land, the estate so acquired "feeds the estoppel," and the grantee becomes entitled as if the grantor had originally possessed it (*Co. Lit.* 47 b; *Rawlyn's case*, 1588, 4 Co. Rep. 419; *Doe v. Oliver*, 1829, 5 Man. & R. K. B. 202; *Sturgeon v. Wingfield*, 1846, 15 Me. & W. 224; cp. the Scotch case of *Svan v. Western Bank of Scotland*, 1866, 4 Sess. Ca. 3 Ser. 663). The rule is stated by Mr. Campbell (*Ruling Cases*, vol. i. p. 480) thus: "The title of a person derived from one who has no title, or whose title is imperfect, is validated in the former person by a conveyance or act in the law whereby the right would have become completely vested in the latter person. This principle has been summarised in the maxim, *Jus superveniens auctori accrescit successoribus*."

But in the case of a lease, if the lessor has an interest which passes to the lessee by the lease, although it is less than the interest purported to be granted, the rule does not apply, and no subsequently acquired interest of the lessor is passed on to the lessee (*Co. Lit.* 47 b; per Parke, B., in *Doe v. Seaton*, 1835, 2 C. M. & R. at p. 730; *Lanyford v. Selmes*, 1857, 3 Kay & J. 220; Bigelow, p. 391). But if the lease were for valuable consideration, the lessor would be compelled to make good the deficiency of the estate which passed by it, out of his subsequent estate (Preston, *Abstracts*, vol. ii. p. 217).

The above exception to the general rule applies only in the case of leases (Bigelow, p. 391; so held in New York, *House v. McCormick*, 1874, 57 N. Y. (12 Sickel) 310).

An estate subsequently acquired by the grantor by fraud does not enure to the benefit of the grantee as against the person defrauded (*Eyre v. Burmester*, 1862, 10 H. L. 90; *Heath v. Crealock*, 1873, L. R. 18 Eq. 215; cp. *Onward Building Society v. Smithson*, [1893] 1 Ch. 1).

In the language used in these cases, the fact that the grantee becomes actually entitled in interest and not only by estoppel appears to have been somewhat lost sight of.

See generally on this head, Bigelow, ch. xi.

C. IN PAIS.

15. *By accepting Possession, or Attornment*.—A tenant cannot deny that his landlord was entitled to the property at the time when the tenant

obtained possession from him, until he has surrendered the possession (*Doe v. Smythe*, 1815, 4 M. & S. 347; 16 R. R. 486); nor a devisee or grantee his testator's or grantor's title, as against the devisee or grantee in remainder (*Board v. Board*, 1873, 1 L. R. 9 Q. B. 48; *Dalton v. Fitzgerald*, [1897] 1 Ch. 440; 2 Ch. 86); nor a licensee his licensor's (*Mills v. Carson*, 1892, 10 R. P. C. 9); nor a bailee his bailor's (*Henderson v. Williams*, [1895] 1 Q. B. 521; *Ex parte Davies*, 1886, 19 Ch. D. 86; *Rogers v. Lambert*, [1891], 1 Q. B. 318; see vol. i. p. 464). The ground of the rule is that the parties have agreed that possession shall be taken on that basis (*Morton v. Woods*, 1868, L. R. 3 Q. B. 658). The rule extends in favour of the landlord's heir (*Weeks v. Birch*, 1894, 69 L. T. 759) or other successor in title, e.g. the remainderman (*Doe v. Whitroe*, 1822, Dow. & Ry. N. P. 1; 25 R. R. 769), or assignee (*Doe v. Birchmore*, 1839, 9 Ad. & E. 662). And it binds the landlord, since estoppels are mutual (*Hartcup v. Bell*, 1883, 1 C. & E. 19), and the assignee of the tenant (*Doe v. Mills*, 1834, 2 Ad. & E. 17), but not a mere licensee from him (*Tadman v. Henman*, [1893] 2 Q. B. 168). The tenant is not bound to admit that the landlord had a fee-simple (*Weld v. Baxter*, 1856, 11 Ex. Rep. 816; 1 H. & N. 568), and he can show that the landlord's title has determined since possession was given. This is the meaning of the maxim that "there is no estoppel where an interest passes" (see *Co. Lit.* 47 b; the notes to *Walton v. Waterhouse* in 1 Williams' Saunders; *Muirhead v. Commercial Cable Co.*, 1894, 11 R. P. C. 317). The tenant can show that he, the tenant, has been evicted by title paramount (*Watson v. Lane*, 1856, 11 Ex. Rep. 769). Mere payment of rent is evidence of the payee's title, but, if made under a mistake, it creates no estoppel (*Cooper v. Blandy*, 1834, 1 Bing. N. C. 45; *Carlton v. Bowcock*, 1885, 51 L. T. N. S. 659).

16. *By Representation*: The rule in *Picard v. Sears* (1837, 6 Ad. & E. 469).—Where one by his words or conduct wilfully (*i.e.* intending his representation to be acted upon, or so that a reasonable man would believe he so intended, *Freeman v. Cooke*, 1848, 2 Ex. Rep. 654) causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded against the latter from averring a different state of things as existing at the time in question (per Denman, L.C.J., 6 Ad. & E. at p. 474; Stephen on *Evidence*, Art. 102). *Freeman v. Cooke* (*supra*) was an action of trover for goods seized by the sheriff in execution. The owner at first told the sheriff that the goods were his brother's, believing the writ to be directed against himself; on learning that the writ was directed against his brother, he said the goods belonged to a third party. It was held that his assignees were not estopped, because he did not intend to induce the sheriff to seize, and no reasonable man would have seized on the faith of his representations taken together. The principle upon which this rule rests is that the party estopped has assented to the other acting in the way in which he has, by his acts, invited him, the other, to act (per Campbell, L.C., in *Cairncross v. Lorimer*, 1860, 3 Macq. H. L. C. at p. 829; *McKenzie v. British Linen Co.*, 1881, 6 App. Cas. 82). See also *Piggott v. Stratton*, 1859, 1 De G., F. & J. 33, explained in *Spicer v. Martin*, 1888, 14 App. Cas. at p. 23.

A false representation, in order to effect an estoppel, must be a representation of an existing fact, not of a mere intention (*Jorden v. Money*, 1854, 5 H. L. Cas. 185; *Maddison v. Alderson*, 1883, 8 App. Cas. 467; *Chadwick v. Manning*, [1896] App. Cas. 231; see Pollock on *Contract*, Appendix, note K), and it must have been acted upon before it was corrected (*Dunston v. Paterson*, 1857, 2 C. B. N. S. 495; *Sandys v. Hodgson*, 1839, 10 Ad. & E. 472). It need not be an active representation. Acquiescence in a mistake

when there is a duty to speak is enough (*McKenzie v. British Linen Co.*, 1881, 6 App. Cas. 82; *Thompson v. Rourke*, [1893] Prob. 70; see ACQUIESCENCE, vol. i. p. 90). Negligence involving a breach of duty to another, calculated to lead, and actually leading him to the mistake, may estop the person in fault from setting up the truth in an action grounded upon the assumption that there was no mistake (see *Vagliano v. Bank of England*, [1891] App. Cas. 107, and the cases there cited, vol. i. p. 479; and *Carr v. L. and N.-W. Ry. Co.*, 1875, L. R. 10 C. P. 307). The negligence must have involved the breach of a duty towards the person who relies on the estoppel (*Low v. Bouverie*, [1891] 3 Ch. 82), and have been the proximate cause of his mistake (per Brett, L.J., in *Carr v. L. and N.-W. Ry. Co.*, *supra*).

17. *Particular Cases*.—Company estopped by its certificate, see *Balkis, etc., Co. v. Tomkinson*, [1893] App. Cas. 396; *In re Concessions Trust*, [1896] 2 Ch. 757; *Bloomenthal v. Ford*, [1897] App. Cas. 156; as against anyone who purchased on the faith of the certificate, *Burkinshaw v. Nicholls*, 1878, 3 App. Cas. 1004; cp. *In re Veure Monnier, etc., Ltd.*, [1896] 2 Ch. 525; *Simm v. Anglo-American Telegraph Co.*, 1879, 5 Q. B. D. 188; see further, vol. iii p. 192; owner or mortgagee of property lending the title-deeds for the purpose of enabling the borrower to raise money upon them, *Brooklesby v. Temperance Building Society*, [1893] 3 Ch. 130; carrier by advice note of the receipt of parcels, *Carr v. L. and N.-W. Ry. Co.*, *supra*; *Seton v. Lafone*, 1886, 18 Q. B. D. 139.

As to estoppels on bills of exchange, see vol. i. p. 479; as to blanks in deeds and instruments, vol. ii. pp. 166, 170; as to "holding out," PRINCIPAL AND AGENT; holding out as a partner, *In re Fraser*, [1892] 2 Q. B. 633; as to negotiability by estoppel, NEGOTIABLE INSTRUMENT; as to "standing by," ACQUIESCENCE, vol. i. p. 90.

18. *An infant* (*Savage v. Foster*, 1722, 9 Mod. 35) or *married woman* (*ib.*; *In re Lush's Trusts*, 1869, L. R. 4 Ch. 591) may be estopped by a *fraudulent* (but see *Mills v. Fox*, 1887, 37 Ch. D. 153) representation. But neither can be made liable upon a contract on the ground that the plaintiff was induced to enter into it by a representation that he or she was *sui juris* (see above, 12.; *Stikeman v. Dawson*, 1846, 1 De G. & Sm. 105; *Lemprière v. Lange*, 1879, 12 Ch. D. 675; see *Cahill v. Cahill*, 1883, 8 App. Cas. at pp. 427, 437. See further, vol. i. p. 96, and 1 White and Tudor's *L. C.*, 7th ed., p. 469).

[*Authorities*.—See generally the notes to the *Duchess of Kingston's* case in 2 Smith's *Leading Cases*, and to *Burroues v. Lock*, in 1 White and Tudor's *L. C.*, 7th ed. (Equitable estoppel), and the title "Estoppel" in Campbell's *Ruling Cases* (to both of which the writer is much indebted). The leading work on the topic is Bigelow on *Estoppel* (American), 5th ed. See also Everest and Strode on *Estoppel*, and Comyn's *Digest* (s.v.).]

Estovers.—Every tenant for life or years has a right, unless restrained by express covenant, to take from the land he holds such an amount of wood as is reasonably necessary to repair, or burn in, the house, to make and repair instruments of husbandry, and to repair hedges or fences. The wood so taken is called "estovers" (from the French *estoffer*, to furnish), or "botes" (a Saxon word meaning "compensation"); and wood taken for the first of the three purposes above named is called house-bote or fire-bote; that taken for the second, plough or cart bote; and that taken for the third, "hay" or hedge bote (see *Co. Lit.* p. 41 b; and Black. *Com.* bk. ii. ch. 3). Copyholders are entitled to the same rights

(*Ashmead v. Ranger*, 1700, 1 Raym. (Ld.) 551), but they may be subject to customary restrictions, as that the wood shall only be taken after assignment by the lord or his bailiff, and the like (see *Heydon and Smith's case*, 1611, 13 Co. Rep. 67); but, on the other hand, there may be a custom to take wood, although not wanted for necessary repairs (*Blewett v. Jenkins*, 1862, 12 C. B. N. S. 16). There may also be common of estovers, or the right of copyholders to take wood for the purposes above mentioned from the waste of the manor, and this right again may be conditioned or limited by special custom. This right to seek wood, which cannot be aliened by copyholders, does not extend over the whole of the waste, but is confined to those parts where the wood is actually found (cp. *Peardon v. Underhill*, 1850, 16 Q. B. 120). And the lord may enclose a portion of the waste against tenants having common of pasture, although they have also other rights of common such as estovers, provided that he leave sufficient common of pasture and do not injure the other common rights (*Fawcett v. Strickland*, 1737, Willes, 57). See also COMMON.

Estray (O. Fr. *Estraiier*) is any beast not wild found within any lordship where it has no right to be, and not claimed by any man as owner (Cowell, *Law Dict. s.v.*; 1 Black. Com. 298). It includes swans and cygnets (4 Co. Inst. 280), but not other birds, and may be treated generally as including all domestic or domesticated beasts of value and presumably owned and not being *feræ naturæ*. See ANIMALS; BIRDS. The law as to estrays forms an exception to the general rules of law as to the right of the true owner of an animal, subject only to the Statutes of Limitation, to recover it by action of *trover* or *detinue* from any person who, however innocently, has taken possession of it.

The owner or occupier of soil on which a stray is found is entitled to distrain it *damage feasant* or to impound it; but this does not affect the title to the animal. But the king or the lord of a manor as an incident of his manorial rights, presumably as a manorial franchise granted by the Crown, may seize an estray, and acquire the ownership of it, on complying with the following formalities, if it is not claimed by the owner within a year and a day. The estray must be put in an open place on the lord's demesne, where the owner has a reasonable chance of seeing and claiming it, and must be proclaimed at the next two market towns, and apparently at the door of the parish church on a Sunday. The owner can claim and take it within a year and a day from the first proclamation, on paying for the cost of finding maintenance and proclamation; but the lord cannot work the animal during the year and day (*Bagshaw v. Goward*, 1605, Cro. (2) 147). Until seizure and proclamation the lord has no title, and until the lapse of the year and day he has only an inchoate title and property, which is, however, sufficient to maintain an action for taking the animal away, or to follow and retake it if it strays, unless it strays into and is seized as an estray by the lord of another manor.

[*Authorities.*—All the authorities on the subject appear to be collected in Burn, *Justice*, 30th ed., "Estray"; and Scriven on *Copyholds*, 7th ed., by Brown, 267.]

Estreats (O. Fr. *Estrait*; Lat. *Extracta*) originally meant a true copy, extract, or note of some record of a Court. It is now invariably used with reference to the enforcement of claims of the Crown in respect of fines,

forfeitures, and forfeited recognisances; but is also applied to a number of Crown *droits* or debts now virtually obsolete, *e.g.* amerciaments, issues, and chattels of felons or fugitives.

It was the practice from the earliest times to extract and certify into the Exchequer copies of all patents or entries in Court rolls which contained provisions or orders in favour of the Revenue. The estreats of Chancery (*extracts cancellariæ*) were copies of all documents affecting the revenue which had been lodged in Chancery. The clerks of all the Royal Courts had to make up an accurate estreat roll showing the nature and details of all such fines, forfeitures, etc., as had been imposed by the Court (see 7 Hen. iv. c. 3; as to Sheriff Courts, see 11 Hen. vii. c. 15). The old Court rolls, apparently to facilitate this task, show in the margin all these fines, etc., as a guide for making up the estreats. Where the fines, etc., had been received in the Court below, the estreat roll served as a check on the accounting officer, and in course of time was required to be verified by the oath of the officer who returned it (4 Will. & Mary, c. 24, s. 4); and wilful misstatements, defects, or omissions are punishable (22 Car. ii. c. 22, s. 5); and refusal, neglect, or failure to make the returns entails amercement (1716, 3 Geo. i. c. 15, s. 12).

Under the old practice the sheriff levied the sums specified in the estreats under the orders of the Court of Exchequer (42 Edw. iii. c. 9), subject to the right of the person affected to petition for relief or plead in estreat (1357, 31 Edw. i. st. 3, c. 3; *Anon.* 1668, Hard. 471, per Hale, C. B.). The practice is not in terms abrogated, and the procedure is regulated by the Revenue Practice Rules of 1860, rr. 110, 111; 2 St. R. & O., Rev. 655.

The Court of Exchequer is now merged in the Queen's Bench Division, and the Queen's Remembrancer must, subject to any orders of the Court, issue process for the enforcement of fines, etc., estreated and not vacated or discharged (3 & 4 Will. iv. c. 99, s. 32; 22 & 23 Vict. c. 21, s. 23). The form now ordinarily in use is prescribed by the Revenue Rules of 1860 (r. 112, Sched. A, Form 11; St. R. & O., Revised, vol. ii. pp. 655, 666). The Remembrancer has to submit to the Treasury accounts of the estreats and the sheriff's returns of process (3 & 4 Will. iv. c. 99, s. 31). The old procedure as to estreats is superseded as to Courts of Quarter Sessions by the Levy of Fines Acts, 1822 and 1823 (3 Geo. iv. c. 46; 4 Geo. iv. c. 37), as modified by the Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), which provide a quicker remedy and virtually substitute the Treasury for the Court of Exchequer (see FINE). In Courts of assize a similar change has been effected as to the North and South Wales Circuits in 1830 (11 Geo. iv. and 1 Will. iv. c. 70, s. 33), as to the County Palatine of Durham and other assize districts in 1859 (22 & 23 Vict. c. 21, s. 32), and the clerks have to send an account to the Treasury (3 & 4 Will. iv. c. 99, s. 29).

In the High Court the proper officers of each department must on the first day of each sittings make out a list of fines not previously estreated and send a copy to the Treasury, and also on the same days, or as and when ordered by the Court, estreat and certify into the Revenue side of the Queen's Bench Division all unpaid fines, etc. (3 & 4 Will. iv. c. 99, ss. 26, 27). Since 1833, the Treasury, without prejudice to the powers of the High Court as successor to the Court of Exchequer, can remit or repay fines, etc., estreated (3 & 4 Will. iv. c. 99, ss. 33, 38).

The effect of these changes has been to decentralise the practice of collecting the Crown dues, and to let each Court issue its own executive

process without reference to the Revenue side of the High Court, and to make the clerk of the Court and the sheriff account directly to the Treasury instead of to the High Court.

In estreating forfeited recognisances the old practice was to extract the recognisance itself from the records of the Court in which it was filed, and send it to the Exchequer (2 Black. Com. 253). The Court could mitigate the imprisonment or other penalty for default (1763, 4 Geo. III. c. 10), a power now also exercised as to the pecuniary penalty by the Treasury. So far back as 1713 it was seen that the proper person to decide whether recognisances should be forfeited and estreated or discharged was the judge of the Court of assize, etc. (*R. v. Tomb*, 1714, 10 Mod. Rep. 278); and now in Courts of assize and Quarter Sessions, fines, forfeitures, and recognisances cannot be estreated or put in process without a written order of the Court after examining a list of the fines, etc. (7 Geo. IV. c. 64, s. 31; 12 & 13 Vict. c. 45, s. 17; 16 & 17 Vict. c. 30, s. 2). These provisions do not apply to sittings in London or Middlesex. See FINE; RECOGNISANCE.

[Authorities.—Vin. Abr. tit. "Estreat"; Com. Dig. do.]

Evacuation.—A military term used to describe the entire removal of fighting forces from a place until then occupied by them; from *vacare*, to be empty (see OCCUPATION). The conclusion of peace is usually accompanied by stipulations for a continuance of occupation until the essential conditions have been fulfilled. In such a case the position of the army of occupation is limited by the terms of the treaty. On evacuation of a place by an enemy it reverts *ipso facto* to its ordinary government.

Evasive Pleading.—A civil pleading is evasive if it does not deal specifically with the allegations of fact in the preceding pleading of the opposite party, or if it deny such allegations evasively or without answering the point of substance. Such a pleading offends against the Rules of the Supreme Court, 1883, Order 19, rr. 13, 19, and can be struck out as embarrassing. See *Annual Practice*, 1898, pp. 471, 478.

Evening School.—The Elementary Education Act, 1891 (54 & 55 Vict. c. 56), s. 1 (1), specially excludes evening schools from the benefit of the fee grant thereby provided of ten shillings a year for each child in average attendance at public elementary schools. And the Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5), s. 2, repeals the 17s. 6d. limit in sec. 19 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 89) (see EDUCATION), as respects day schools, but not as respects evening schools, to which, indeed, the Voluntary Schools Act in no way applies (cp. §. 4). The term "evening school" is officially used as synonymous with evening continuation school. Such evening continuation schools are now subject to a separate code of regulations of the Education Department, to which reference must be made for detailed information as to grants, subjects of instruction, etc. It may here be noted that under the Evening School Code for 1897 no scholar will be recognised who is under fourteen, unless such scholar has been under instruction for not less than six months in the three elementary subjects in Standard V., or in a higher standard, or is exempt from the legal obligation to attend school (art. 8); whilst the attendances of persons over twenty-one are now for the first time recognised.

Eviction.—See RECOVERY OF LAND.

Evidence.

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The law of evidence consists of two sets of rules—

- (i.) The rules determining what facts are relevant to the issue;
- (ii.) The rules determining how those facts are to be proved.

These rules are sometimes further divided into (*a*) those which determine what are the media of proof; (*b*) those which determine how the media of proof are to be adduced in evidence.

(i.) **RELEVANT FACTS.**—The facts to be proved on the trial of any action or criminal proceeding are such of the facts constituting the cause of action or crime, and the defence, as are put in issue by the parties. Which of the many facts that may constitute a cause of action or crime are, in the particular case, in issue, is determined by the pleadings and admissions made for the purposes of the case, if any. It is the province of the law of evidence to determine how those facts shall be proved.

Every fact in issue may consist of a number of details of fact. The proof of the fact in issue consists of the proof of each of these details of fact. All such evidentiary facts are facts relevant to the issue. Thus if the issue is whether A. is seised of lands, each step in his title, and if he claims as heir, each step in his pedigree, is a relevant fact. If the execution of a will is one of the facts in issue, that fact is proved by proof of the signatures of the testator and of the attesting witnesses, and that they signed in the presence of each other. If the testamentary capacity of the testator is disputed, an indefinite number of facts may be relevant as showing his sanity (cp. *Wright v. Doe*, 1837, 7 Ad. & E. 313, 384).

Direct and Circumstantial Evidence.—Relevant facts are divided loosely into two classes, direct evidence and circumstantial evidence, according as their relation to the fact in issue is more or less remote. Direct evidence has been defined as “evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum*”; circumstantial evidence as “direct evidence of a minor fact or facts incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred.” A witness deposes that he saw A. inflict on B. a wound of which he instantly died; this is a case of direct evidence. B. dies

of poisoning; A. is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison, wrapped in a particular paper, and of the same kind as that which caused his death; the paper is found in his secret drawer, and the poison gone. The evidence of these facts is direct; the facts themselves are indirect and circumstantial as applicable to the inquiry whether a murder has been committed by A. (see *Wills on Circumstantial Evidence*, 4th ed., by Mr. Justice Wills).

Similar Facts.—Whether the evidence be direct or circumstantial it must be confined to the facts in issue or to facts whose connection with the facts in issue is obvious and not too remote. So evidence of facts unconnected with the facts in issue, however similar, is not generally admissible.

If the conduct of a man on a particular occasion is in issue, his conduct, or the conduct of other persons, on other similar occasions cannot generally be given in evidence (*Hollingham v. Head*, 1858, 4 C. B. N. S. 388; *Griffiths v. Payne*, 1839, 11 Ad. & E. 131). So on a question as to the terms on which premises were let to a tenant, evidence of the terms on which the same landlord let to other tenants is not admissible (*Carter v. Pryke*, 1792, 1 Pea. 95), and on a prosecution evidence that the prisoner has previously committed similar offences cannot be given (*R. v. Butler*, 1846, 2 Car. & Kir. 221). Evidence of the existence of a particular custom in one manor is no evidence of a similar custom in an adjoining manor (*Marquis of Anglesey v. Lord Hatherton*, 1842, 10 Mee. & W. 218; and see *Rowe v. Brenton*, 1828, 8 Barn. & Cress. 758). There are, however, certain exceptions, or apparent exceptions, to this rule:

(a) Where it is established that the two sets of facts are identical, or have such features in common that what is true of the one is true of the other. As, for instance, where the issue is as to ownership of a certain spot of land, evidence of possessory acts over other land may be given, provided there is such a common character of locality between those parts of the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the person to whom the other parts belonged (*Jones v. Williams*, 1837, 2 Mee. & W. 326; *Doe d. Barrett v. Kemp*, 1835, 2 Bing N. C. 102). So if the boundaries of a particular estate are in dispute, and it be proved that the estate was coterminous with a hamlet, evidence may be given to prove the boundary of the hamlet (*Thomas v. Jenkins*, 1837, 6 Ad. & E. 525).

It is on this principle that the generalisations of science are admitted. An expert witness is often asked to state a general law from which he deduces the necessary or probable course of events in the particular case in issue, and the correctness of his generalisation may be tested by asking him to state what has taken place in similar circumstances within his knowledge (see *R. v. Palmer*, 1856, Printed Report, p. 124; and see *Brown v. Eastern and Midland Ry. Co.*, 1889, 22 Q. B. D. 391: on a question whether a horse had shied at a heap of road scrapings, evidence that other horses had shied at the same heap was admitted).

(b) Another exception is that where knowledge, intention, good or bad faith, malice, or other state of mind, or any state of body or bodily feeling, is in issue, or is relevant to the issue, evidence of conduct similar to that in issue is admissible. So on an indictment for uttering counterfeit coin, knowing it to be counterfeit, the fact that the prisoner had on previous occasions uttered other counterfeit coins is relevant (*R. v. Foster*, 1855, Dear. 456).

Evidence of this kind is often used in prosecutions for false pretences,

to prove the prisoner's knowledge that the pretences are false (*R. v. Francis*, 1874, L. R. 2 C. C. R. 128), and in actions of libel to prove actual malice (*Barrett v. Long*, 1851, 3 H. L. 395, 414), and in actions for damage for injuries done by domestic animals to prove the owner's knowledge of the ferocious character of the animal (*Worth v. Gilling*, 1866, L. R. 2 C. P. 1).

In prosecutions for receiving goods, knowing them to have been stolen, evidence may be given that there was found in the possession of the defendant other property stolen within the preceding twelve months, and also evidence of previous convictions within five years of any offence involving fraud or dishonesty, to prove the prisoner's guilty knowledge (34 & 35 Vict. c. 112, s. 19; and see *R. v. Carter*, 1884, 12 Q. B. D. 522).

(c) Another exception arises in prosecutions for rape or attempted rape. In such cases the character of the woman as regards chastity is considered as relevant to the issue, as directly bearing upon the question of consent.

Evidence may be given to show that the woman against whom the offence is alleged to have been committed was of a generally immoral character (*R. v. Clarke*, 1817, 2 Stark. N. P. 241). The woman may also be asked in such cases whether she has had connection with other specified men, but her answer cannot be contradicted (*R. v. Holmes*, 1871, L. R. 1 C. C. R. 334). She may also be asked whether she has had connection on other occasions with the prisoner (*R. v. Martin*, 1834, 6 Car. & P. 562).

Evidence of character is admissible where a person's character is directly in issue, as may be the case in actions for defamation, or where it is impliedly in issue by reason of the amount of damages depending on the plaintiff's character. This may be the case in actions for defamation (*Wood v. Durham*, 1888, 21 Q. B. D. 501), or seduction (*Banfield v. Massey*, 1808, 1 Camp. 460; *Dodd v. Norris*, 1814, 3 Camp. 519; 14 R. R. 832), or breach of promise of marriage (*Foulkes v. Selway*, 1801, 3 Esp. 236).

But where the character is not in issue it is generally irrelevant as proof of other issues. In criminal proceedings, however, the rule is relaxed in favour of the prisoner. Though the prosecution cannot in the first place give evidence of the prisoner's bad character (*R. v. Tuberville*, 1864, 34 L. J. M. C. 20), or even of his own admissions that he is addicted to the very vice for which he is being prosecuted (*R. v. Cole*, 1810, Phill. Ev. vol. i. p. 508); yet a defendant in criminal proceedings may call evidence of his own good character; but such evidence must be confined to his general reputation for good character, and must not extend to particular acts of good character, or to the particular opinion of the witness (*P'Anson v. Stuart*, 1787, 1 T. R. 754, per Buller, J.; 1 R. R. 392). If the prisoner calls such evidence it is open to the prosecution to call similar evidence as to the defendant's general reputation for bad character (*Rowton's case*, 1865, L. & C. 520, 529; and see Wills on *Evidence*, p. 57).

This principle does not extend beyond criminal proceedings. A party against whom fraud or theft is alleged in a civil action cannot avail himself of evidence of character to meet the charge (*Goodwright v. Hicks*, 1789, B. N. P. 296; *Cornwall v. Richardson*, 1825, Ry. & M. 305).

[Cross-examination of witness to character and evidence to rebut, see WITNESS.]

Evidence to Explain.—Evidence which would in the first instance be irrelevant, may become admissible to explain other relevant facts. Thus in the trial of Lord George Gordon it was proved that the defendant had said that the Scotch had no redress till they pulled down mass houses. Evidence was thereupon admitted to explain this statement by proving

that mass houses had actually been destroyed in Scotland (*R. v. Lord George Gordon*, 1781, 21 St. Tri. at p. 650).

Res Gestæ.—The whole of the evidentiary facts, that is the details of fact which compose the facts directly in issue, as above explained, are evidence as part of the history of the case. These facts are sometimes called the *res gestæ* (per Parke, B., *Wright v. Doe d. Tatham*, 1837, 7 Ad. & E. 313, 355, 384). The term is equally applicable to acts, to words spoken, and to writings. But it is to the two latter that the term is generally applied. The words constituting a slander, a libel, a contract, or words accompanying and explaining an act, may all be given in evidence, if relevant. The admissibility of words that form part of the facts in issue is in no sense an exception to the rule which excludes hearsay evidence. The words are admitted not as narrative, but as facts. The distinction is well illustrated by the cases of *Wright v. Doe d. Tatham* (*supra*), and the *Aylesford Peerage*, 1885, 11 App. Cas. 1. In the former, on an issue raising the question whether a testator was of sound mind, three letters written at various times to the testator by persons acquainted with him were produced. The letters were addressed to him as an intelligent man. Considered as statements showing the opinion of the writers as to the testator's intelligence, these letters were held not admissible, as being mere hearsay. But if the letters had been connected in evidence with some act of the testator, as if he had acted on them or answered them, his so doing would have been admissible facts, and the letters would have been admissible as explanatory of those acts. In the *Aylesford Peerage* case (*sup.*) the issue was as to the legitimacy of a child. Letters written by the mother in which she stated in effect that the child was illegitimate, and gave directions as to its custody and maintenance, were admitted as evidence of her conduct, although the mother could not have given evidence herself that the child was a bastard.

Declarations accompanying Acts.—It is perhaps on this principle that declarations accompanying and explaining relevant acts are admissible as proof of the quality and intention of such acts (see *Wright v. Doe d. Tatham*, 1837, 7 Ad. & E. 313, 384). So where the vendor of land takes the purchaser over the land to show him the parcels, and in so doing makes a statement that a parcel is the one contained in the conveyance, such statement may be given in evidence as a declaration accompanying the act of sale (*Parrott v. Watts*, 1877, 47 L. J. C. P. 79). And on questions of domicile, declarations as to the intention with which a person goes to a place are admissible (*Doucet v. Geoghegan*, 1878, 9 Ch. D. 441; *Hodgson v. De Beauchesne*, 1858, 12 Moo. P. C. 285). And in determining whether an act is an act of bankruptcy when the intent with which it is done is material, the intent may be shown by declarations relating to it (*Rouch v. G. W. Rwy. Co.*, 1841, 1 Q. B. 51; *Ridley v. Gyde*, 1832, 9 Bing. 349; *Robson's Bankruptcy*, 7th ed., pp. 134, 139).

Upon a question as to the ownership of goods, evidence that the alleged owner gave directions to other persons as to dealing with those goods is evidence of an act of ownership (*Sharp v. Newsholme*, 1839, 5 Bing. N. C. 713).

In a trial for high treason by assembling a multitude of persons by force and arms to compel the repeal of a certain Act of Parliament, the cry of the mob assembled is evidence as tending to throw light on the general intent of the persons assembled (*R. v. Lord George Gordon*, 1781, 21 St. Tri. 486, 515, 535, 539; xi. *Ruling Cases*, 282; and see *R. v. Hunt*, 1820, 3 Barn. & Ald. 566; 22 R. R. 485).

Documents as Res Gestæ.—A document or statement may be either a *res gestæ* or a medium of proof or altogether inadmissible. Thus, a letter containing defamatory statements is admissible as part of the *res gestæ* in an action for libel. But except as against the writer it is not admissible as evidence of the truth of the facts stated therein. As against the writer, however, it may be available as an admission of the truth of the facts stated.

It is as *res gestæ* that *old* leases are admissible as acts of ownership, against parties in no way privy to them. Where the question is whether a person was in possession of land at some time long past, the facts that he granted leases, and that others paid him rent under those leases, are evidence as acts of ownership, though they are *res inter alios acta*, and clearly not admissible as admissions (*Bristow v. Cormican*, 1878, 3 App. Cas. 641, 653, 668); but the recitals in leases, and other documents of title, are not evidence of the facts recited, except as admissions between the parties and their privies (*ibid.* p. 662).

The importance of documentary evidence is chiefly due to the fact that once the genuineness of a relevant document is proved, there can seldom be any dispute as to its contents. Witnesses may give very different accounts of what passed in a conversation, but if what the parties said was reduced to writing, whether in the form of correspondence or a formal agreement, the documents show at once beyond dispute what passed.

(ii.) *PROOF OF RELEVANT FACTS.*—It is the province of the judge to determine all preliminary questions of fact upon which the admissibility of evidence depends (*Bartlett v. Smith*, 1843, 11 Mec. & W. 483; *Ruling Cases*, vol. xi. p. 177).

Witnesses.—The relevant facts must be proved in Court by witnesses. The evidence of witnesses must generally be given on oath or affirmation (see *AFFIRMATION*), in open Court, or, in those cases in which it is permitted by the practice of the Courts, by affidavit in writing (see *OATHS, DEPOSITIONS, and COMMISSION TO TAKE EVIDENCE*). The exceptional cases in which a witness may give evidence otherwise than on oath or affirmation are dealt with elsewhere (see *WITNESS*).

The evidence of a witness consists of statements by him of such of the relevant facts as are within his own personal knowledge. They may be given in the form of a narrative, or by answers to questions put by counsel (see *WITNESS*), and must consist only of that which he knows of his own knowledge. Thus a witness cannot repeat hearsay, or give his opinion, or repeat statements he has himself made on a previous occasion. The question being whether an event happened, it is quite irrelevant that on a previous occasion the witness stated that it had happened. He may, however, be asked in cross-examination whether he has not on previous occasions made statements inconsistent with his present evidence (see 17 & 18 Vict. c. 125, ss. 23 and 24, and *WITNESS*). This is allowed, not because such statements have any evidentiary value, but merely to test the accuracy and consistency of the witness.

Hearsay.—The rule that the witness must only state matters within his own knowledge, what he has himself heard, seen, or perceived, is expressed by the rule that hearsay is not evidence, or that a witness cannot repeat what he has heard others tell about the facts in issue. There are, however, several exceptions to this rule—

(1) Where words used are part of the *res gestæ*. That is where they are relevant facts as above explained.

(2) Where the words amount to an admission by the party (or his agent

or privy) against whom they are used (see ADMISSIONS). And as admissions may be by conduct as well as by words, it is permissible to give in evidence statements made in the presence of a party, when his answers to such statements, or his conduct in relation thereto, amount to an admission of their truth (*Bessela v. Stern*, 1877, 2 C. P. D. 265). In the same way letters written to a party may be evidence against him if written in such circumstances that his not answering them would amount to an admission (*Richards v. Gellatly*, 1872, L. R. 7 C. P. 127), but not otherwise (*Wiedemann v. Walpole*, [1891] 2 Q. B. 534; and see *Wright v. Doe d. Tatham*, *supra*).

(3) Words spoken by a deceased person are not generally admissible (*Wright v. Doe*, 1837, 7 Ad. & E. 313), but they are when spoken in certain defined circumstances that are considered sufficient to ensure their truth—such are declarations against the interest of the declarant, declarations made in the course of duty, dying declarations, and declarations relating to pedigree (see DECLARATIONS OF DECEASED PERSONS).

Opinions of Experts.—A witness is not, as a rule, permitted to state his belief or opinion. The function of the witness is to prove facts, and it is for the Court or the jury to draw inferences and form opinions from those facts (see *Carter v. Boehm*, 1765, 3 Burr. 1905; 1 S. L. C. 474); but the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, that is, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it. Thus the opinions of scientific men are admitted on questions of science, medical men are frequently called upon to state their opinions as to the cause of disease and the probable effects of injuries, and persons skilled in mechanics, surveyors, and artists may be asked their opinions on questions which their peculiar knowledge qualifies them to deal with. And experts in handwriting may give their opinion as to the identity or otherwise of specimens of handwriting shown to them (see HANDWRITING, PROOF OF).

It is on the same principle that lawyers practising abroad are called to state their opinion on questions of foreign law (*Bristow v. Sequeville*, 1850, 5 Ex. Rep. 275, and 22 & 23 Vict. c. 63 and 24 & 25 Vict. c. 11 by which the opinion of colonial and foreign Courts may be obtained). See further as to experts, ASSESSORS; FOREIGN LAW, PROOF OF; MEDICAL JURISPRUDENCE.

Belief.—Lastly, where evidence is given by affidavit on *interlocutory* proceedings the witness may make statements as to his belief, stating the grounds thereof, that is, the source of the information on which the belief is founded (R. S. C., Order 38, r. 3; *Quartz Hill Gold Mining Co. v. Beall*, 1882, 20 Ch. D. 501; see also Order 30, r. 7).

Public Documents.—There are, however, some documents the contents of which have an evidentiary value, although in principle they are only hearsay. Such documents are called public documents; they consist for the most part either of the proceedings of some department of the State, or of some authority acting under statutory powers for the benefit of the community, or of public records of specific classes of facts duly entered and kept by public officials in pursuance of a duty imposed on them in that behalf (*Wills on Evidence*, p. 179). Thus public Acts of Parliament and royal proclamations are *prima facie* evidence against every one of the facts recited in their preambles (*R. v. Sutton*, 1816, 4 M. & S. 532). The *Gazette* is at common law *prima facie* evidence of all Acts of State which are published in it (*A.-G. v. Theakstone*, 1820, 8 Price, 89; 22 R. R. 716; *R. v. Holt*, 1793,

5 T. R. 436), and by various statutes is made evidence of many other matters which are published therein.

A large number of other public documents are, by various statutes, made evidence of the facts stated in them. Many of these are of a special character. The following are among those of most general importance:—

Certificates of birth, death, burial, and marriage (6 & 7 Will. iv. c. 86, ss. 31–38; 6 & 7 Will. iv. c. 85, ss. 18–24 and 44; 10 & 11 Vict. c. 65, ss. 32 and 33; 16 & 17 Vict. c. 134; 17 & 18 Vict. c. 87; 20 & 21 Vict. c. 81; 27 & 28 Vict. c. 97; 37 & 38 Vict. c. 88, ss. 1–8, 32–38; and see *R. v. Weaver*, 1873, L. R. 2 C. C. R. 85; *In re Hall's Estate*, 1852, 22 L. J. Ch. 177; *In re Porter's Trusts*, 1856, 25 L. J. Ch. 688).

Certificates of the incorporation of registered companies, certified copies of the registers of shareholders, of resolutions of shareholders, and of many other matters connected with companies (The Companies Acts, 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 53 & 54 Vict. c. 62).

Reports of official receivers in bankruptcy, and various other documents connected with bankruptcy proceedings (53 & 54 Vict. c. 71).

Bankers' books, for certain purposes (42 Vict. c. 11; 45 & 46 Vict. c. 72, s. 11 (2)).

Register of British ships and official log-books (57 & 58 Vict. c. 60, ss. 11, 64, 239, 695).

Register of copyrights (5 & 6 Vict. c. 45, s. 11; 25 & 26 Vict. c. 68, ss. 4 and 5).

Recitals and maps in enclosure awards (8 & 9 Vict. c. 118, ss. 2 and 146; 45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30, s. 2).

Registers of medical practitioners (21 & 22 Vict. c. 90, ss. 15, 27, 32), of dentists (41 & 42 Vict. c. 33, ss. 5 and 29), of veterinary surgeons (44 & 45 Vict. c. 62, ss. 9 and 17), of chemists and druggists (31 & 32 Vict. c. 121, s. 13), of apothecaries (55 Geo. III. c. 194, s. 21; 14 & 15 Vict. c. 99, s. 8).

Register of newspapers (44 & 45 Vict. c. 60, ss. 8, 9, 15).

Register of patents and various documents under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).

The law list (23 & 24 Vict. c. 127, s. 22), minutes, by-laws, etc., of various public bodies, such as Boards of Guardians (5 & 6 Vict. c. 57, s. 17; 7 & 8 Vict. c. 101, s. 69; 11 & 12 Vict. c. 110, s. 11), School Boards (33 & 34 Vict. c. 75, s. 30 (4)), Parish Councils (56 & 57 Vict. c. 73, Sched. 2), District Councils (38 & 39 Vict. c. 55, ss. 186 and 199), and Borough and County Councils (45 & 46 Vict. c. 50, ss. 22 and 24; 51 & 52 Vict. c. 41, s. 75).

Other documents are of a partly public nature, that is to say their contents are evidence only against particular classes of persons affected by them. Such are the rolls of manor Courts and the books of common law corporations (*Sturla v. Freccia*, 1880, 5 App. Cas. 623, 643).

Reputation as to Public and General Rights.—Upon questions of public rights (such as a highway) or general rights (i.e. rights common to a considerable number of persons, such as the inhabitants of a parish or manor) hearsay statements of deceased persons are admissible as evidence of reputation.

In the case of general rights, a statement to be admissible must have been made by a person shown to have had some connection with the right in dispute, such as an inhabitant (*Newcastle (Duke of) v. Broctowe (Hundred of)*, 1832, 4 Barn. & Adol. 273; 1 Nev. & M. 601). Where the right is public there is no such limitation. In a matter in which all are concerned,

reputation from anyone is receivable (*Crease v. Barrett*, 1835, 1 C. M. & R. 919, per Parke, B., p. 929).

The statements must be founded on some reputation, *i.e.* must reflect the common report, not an individual opinion, though they need not be so expressed (*Barraclough v. Johnson*, 1838, 8 Ad. & E. 99). They must be confined to general matters, and must not touch particular facts (*R. v. Bliss*, 1837, 7 Ad. & E. 550; *cp. Crease v. Barrett*, 1835, 1 C. M. & R. 929). They must have been made before any dispute arose in regard to the rights in respect of which they are to be used (*R. v. Cotton*, 1813, 3 Camp. 444; *Newcastle (Duke of) v. Broxtowe (Hundred of)*, *ubi supra*). The statements may consist of written or oral statements (see *Weeks v. Sparke*, 1813, 1 M. & S. 686; 14 R. R. 546). They may be made in maps prepared by or by the direction of persons interested in the matter, in copies of Court rolls, deeds and leases between private persons, verdicts, judgments, decrees and orders of Courts and similar bodies if final, or resolutions of meetings of inhabitants (cases above cited, and *Lord Dymraven v. Llewellyn*, 1850, 15 Q. B. 791; xi. *Ruling Cases*, 419; *R. v. Bedfordshire*, 1855, 4 El. & Bl. 535; xi. *Ruling Cases*, 427; and Stephen, *Evidence*, Illustrations to Article 30; Taylor, *Evidence*, ss. 607-634).

Real Evidence.—The evidence of a witness may consist in part in the identification of persons, things, and documents.

Where any place, person, or physical object is a relevant fact, it may be brought before the jury by description, or may be produced physically and identified on oath. Thus in prosecutions for larceny it is usual to produce in Court the thing stolen, and witnesses are called to identify the thing—the prosecutor usually identifies it as his property, and he or another witness swears that the object was found on the prisoner, or otherwise identifies it as the subject of the theft. In the same way where there is a dispute as to the quality of goods, it is not uncommon to produce the goods or a sample in Court. Where a place is material, or any object that cannot be conveniently produced in Court, the jury may be taken to have a view. In all cases, civil or criminal, there is power for the Court to order a view. It is frequently done when it is important for the jury to understand the nature of the place where something has happened (see VIEW and R. S. C., Order 50, rr. 3-5; *R. v. Martin*, 1872, L. R. 1 C. C. R. 378; 6 Geo. IV. c. 50, and C. O. R. rr. 159 and 252). The parties may, however, rely on description only. There is no rule at common law compelling production of a chattel (*R. v. Francis*, 1874, L. R. 2 C. C. R. 128).

Production of Private Documents.—(1) The document may be produced by the party himself if it is in his possession or control.

(2) If it is in the possession of the opposite party, notice to produce must be given, and the failure to produce after reasonable notice admits secondary evidence (Order 31, r. 12; see NOTICE TO PRODUCE).

(3) If the document is in the possession of a third party he may be compelled to produce it by being served with a *subpoena duces tecum* (Order 37, rr. 26-34; see WITNESS).

Where a part of the evidence consists of a document, there is a strict rule that the document itself *must* be produced in Court if possible. No oral evidence of the contents or copy is admissible to prove the contents until the original has been accounted for, and its absence explained (*R. v. Elworthy*, 1867, L. R. 1 C. C. R. 103; *R. v. Llanfaelthy (Inhabitants)*, 1853, 2 El. & Bl. 940; xi. *Ruling Cases*, 451). The rule applies equally whether the document is part of the *res gestæ* (*R. v. Haworth*, 1829, 4 Car. & P. 254) or a medium of proof. The only exception is where the

contents of the document are irrelevant, and the document is treated as a mere chattel, as in an action for conversion or detention or negligent loss of an instrument (*Scott v. Jones*, 1813, 4 Taun. 865; 14 R. R. 686; *How v. Hall*, 1811, 14 East, 274).

So on an indictment for stealing a bill it appears that its identity may be proved by parol evidence, but perhaps only if the original is in the prisoner's possession (*R. v. Aickles*, 1784, 1 Lea. 294, 297 (n), and 300 (n)).

The production of the original document is called primary evidence, or the best evidence. Proof of its contents by means of a copy or by oral evidence is called secondary evidence.

Parol Evidence to vary written Documents.—When any transaction has been reduced into writing, parol evidence is not admissible to contradict the terms thereof (*Merres v. Ansell*, 1771, 3 Wils. 275; *Abrey v. Cruw*, 1869, L. R. 5 C. P. 37). There are many exceptions to this rule, of which the following summary indicates the general nature. Parole evidence is admitted—

(a) To show that the date appearing on the document is not the true date (*Steele v. Mart*, 1825, 4 Barn. & Cress. 272);

(b) To prove the true consideration of an agreement when ambiguous or fraudulent (*Filmer v. Gott*, 1774, 4 Bro. P. C. 230, 244; *Goldshede v. Swan*, 1847, 1 Ex. Rep. 154; and see 41 & 42 Vict. c. 31, s. 8, and cases thereon);

(c) To prove that a contract is subject to a condition which suspends its operation (*Pym v. Campbell*, 1856, 6 El. & Bl. 370; *Pattle v. Hornibrook*, [1897] 1 Ch. 25);

(d) To prove a collateral or subsequent oral agreement not contradicting the written contract (*Erskine v. Adeane*, 1873, L. R. 8 Ch. 756; *Angell v. Duke*, 1875, L. R. 10 Q. B. 174; *Morgan v. Griffith*, 1871, L. R. 6 Ex. 70; *Barton v. Bank of New South Wales*, 1890, 15 App. Cas. 379);

(e) To prove any matter which in law avoids an instrument, whether it be fraud, forgery, duress, illegality, etc. (*Doe d. Chandler v. Ford*, 1835, 3 Ad. & E. 649; *Paxton v. Popham*, 1808, 9 East, 408, 421; *Collins v. Blantern*, 1767, 2 Wils. 341, and notes thereto in 1 Sm. L. C. 355);

(f) To prove a clerical error (*Hutchins v. Scott*, 1837, 2 Mee. & W. 809, 816);

(g) To prove mistake in actions for rectification or rescission of contracts, etc. (*Payet v. Marshall*, 1884, 28 Ch. D. 255);

(h) To explain latent (but not patent) ambiguities (*Macdonald v. Longbottom*, 1859, 1 El. & El. 977, 987; *Simpson v. Margitson*, 1847, 11 Q. B. 23; *Smith v. Thompson*, 1849, 8 C. B. 44);

(i) To show that words used have a special user, local or mercantile (*Smith v. Wilson*, 1832, 3 Barn. & Adol. 728; *Grant v. Muldox*, 1846, 15 Mee. & W. 737; *Simpson v. Margitson*, *supra*);

(k) To identify the subject-matter of a contract, or things and persons referred to (*Goodtitle, d. Radford v. Southern*, 1813, 1 M. & S. 299; 14 R. R. 435; *Doe v. Hurthwaite*, 1820, 3 Barn. & Ald. 633; 22 R. R. 508; *Beaufort (Duke) v. Swansea (Mayor, etc.)*, 1849, 3 Ex. Rep. 413);

(l) Oral evidence (if not inconsistent with the terms of the written document) may be given of local and trade customs, or commercial usage in relation to which a contract was made, and which are therefore impliedly included therein. This principle is applicable in contracts between landlord and tenant, in commercial contracts, and in contracts in other relations of life in which known usages have been established and prevail (*Wigglesworth v. Dallison*, 1779, 1 Doug. 201; 1 Sm. L. C. 528; *Hutton v. Warren*, 1836, 1 Mee. & W. 466).

[See Roscoe's *Nisi Prius*, pp. 16-33.]

Secondary Evidence of a private document is admissible in the following circumstances:—

(a) Where it is proved to the satisfaction of the judge that the original has been lost or destroyed (*Munn v. Godbold*, 1825, 3 Bing. 292);

(b) Where the original is in the possession or control of the opposite party, and after having had notice to produce he fails to produce it (Order 31, r. 12; see NOTICE TO PRODUCE);

(c) Where the original is in the possession of a person who is not a party to the proceedings, who attends in Court with the document, and there lawfully refuses to produce it on the ground of privilege (*Dwyer v. Collins*, 1852, 7 Ex. Rep. 639);

(d) Where the document is in the custody of a person who is not within the jurisdiction, and who, by the law or usage of the place, is not permitted to remove it (*Alivon v. Furnival*, 1834, 1 C. M. & R. 277; *Quilter v. Jorss*, 1863, 14 C. B. N. S. 747);

(e) Where production is impossible or highly inconvenient by reason of the nature of the writing, as in the case of inscriptions on tombstones, writings on walls, surveyors' marks on boundary trees, and notices affixed to boards (per Lord Abinger and Alderson, B., in *Mortimer v. M'Callan*, 1840, 6 Mee. & W. 58; *R. v. Fursey*, 1833, 6 Car. & P. 81, 85).

If any of these conditions are fulfilled, secondary evidence of a document is admissible.

There are various ways of giving secondary evidence of private documents, all of which are equally admissible—there being no degrees of secondary evidence (*Doe d. Gilbert v. Ross*, 1840, 7 Mee. & W. 102; xi. *Ruling Cases*, 472).

(a) A witness who has read the document may give parol evidence of its contents (*Brown v. Brown*, 1840, 8 El. & Bl. 876; xi. *Ruling Cases*, 491).

(b) A copy may be produced, the correctness of which may be proved by a witness who has compared it with the original, a copy admitted by the other side to be correct (see NOTICE TO ADMIT), a copy furnished by the other side, or an admission (parol or written) as to its contents proved to have been made by the party against whom it is used (*Doe v. Ross*, 1840, 7 Mee. & W. 102; *Slatterie v. Pooley*, 1840, 6 Mee. & W. 664; the *Queen's case*, 1820, 2 B. & B. 284; 22 R. R. 662).

Wills.—Special modes are provided for proving wills and letters of administration. Wills of which probate has been granted may be proved by production of the probates, or of exemplifications, or official copies thereof, purporting to be sealed with any seal of the Probate Division; and letters of administration, by production of the original, or of an exemplification or certified copy purporting to be sealed in the same way (20 & 21 Vict. c. 77, ss. 22, 69).

When it is necessary to prove a will to establish a devise or other testamentary disposition of realty, the will must be proved by calling an attesting witness unless—

(a) The will is more than thirty years old reckoned from the date of execution, and is produced from the proper custody, when no further proof is required (*Doe v. Wolley*, 1828, 8 Barn. & Cress. 22; *Doe v. Burdett*, 1835, 4 Ad. & E. 1);

(b) The will has been proved in solemn form, or its validity established in a contentious suit—when it may be given in evidence by production of the probate or an official copy (20 & 21 Vict. c. 77, s. 62);

(c) Ten days before the trial notice of the party's intention to prove

the will by production of probate or an official copy is given to the other side, and the party receiving the notice does not within four days give notice that he disputes the devise (*ibid.* s. 64; and see 60 & 61 Vict. c. 65, s. 2).

To prove the contents of a lost will, evidence may be given of declarations made by the testator before its execution as to his intention, or after its execution as to the dispositions he had made (*Johnson v. Lydford*, 1868, L. R. 1 P. & D. 546; *Sugden v. Lord St. Leonards*, 1876, 1 P. D. 154).

Proof of Private Documents.—The document when produced must be proved in one of four ways—

- (1) By notice to admit;
- (2) By ordinary witnesses;
- (3) By attesting witness;
- (4) By proof of production from the proper custody.

(1) By notice to admit. This mode of proof is not applicable to criminal proceedings or to documents which by law require attestation. In other cases either party may give the other party notice to admit (see NOTICE TO ADMIT).

(2) If a document is to be proved by ordinary witnesses the proof may consist of proof of the handwriting of the body of the document, or of the signature only if nothing more is necessary to make the document operative (see HANDWRITING, PROOF OF). Where sealing or delivery, or both (as in the case of deeds), are necessary to the validity of the document, these must also be proved. Sealing may be proved either by a witness who actually saw the seal affixed or acknowledged, or it may be presumed from the fact that the person alleged to have sealed it is proved to have signed the document at a time when it contained a declaration that the seal opposite to his signature is his seal (*Talbot v. Hodson*, 1816, 7 Taun. 251; 2 Marsh. 527). Delivery may be presumed similarly (*Grellier v. Neale*, 1792, Pea. 146; 3 R. R. 669).

(3) Proof by an attesting witness. Any document the execution of which has been attested may be proved by an attesting witness (17 & 18 Vict. c. 125, s. 26). Documents to the validity of which attestation is necessary must be so proved. One of the attesting witnesses must be called if possible. If no attesting witness can be produced, it is sufficient to prove the signature of an attesting witness, from which delivery and sealing will be presumed (*Milward v. Temple*, 1808, 1 Camp. 375; and see HANDWRITING, PROOF OF).

(4) A document which appears from its date to be thirty years old is presumed to be of that age. An ancient document (*i.e.* one thirty years old) is presumed to have been signed, sealed, delivered, attested, and stamped in the manner it purports to have been, if it is produced from the proper custody and its appearance when produced is not inconsistent with its authenticity (*Meath (Bishop) v. Winchester (Marquess of)*, 1836, 3 Bing. N. C. 183, 200). The custody must be proved (*Evans v. Rees*, 1839, 10 Ad. & E. 151), and must be such as appears to the Court consistent with its genuineness (*Doc dem Jacobs v. Phillips*, 1845, 8 Q. B. 158).

Stamps.—Many documents require to be stamped to be admissible in evidence (see STAMPS). When an instrument has been lost there is a *prima facie* presumption that it was duly stamped; but if it is proved to have been unstamped, secondary evidence of the contents cannot be given (*Rippin v. Wright*, 1819, 2 Barn. & Ald. 478; 21 R. R. 363; *Marine Investment Co. v. Havaside*, 1872, L. R. 5 H. L. 624).

Proof of Public Documents.—There are certain documents of such a public nature that no proof of their genuineness is required at common law other

than their production from the proper custody. At common law some of these documents were proveable by copies (*Lynch v. Clerke*, 1696, 3 Salk. 154; *Mortimer v. M'Callan*, 1840, 6 Mee. & W.58), and now all such documents may be proved by examined or certified copy or extract. It is enacted (14 & 15 Vict. c. 99, s. 14) that "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same not exceeding fourpence for every folio of ninety words."

In the case of many public documents special statutory modes are provided for proving them either by examined or certified copy or otherwise. An examined copy is a copy the correctness of which is sworn to by a witness who has examined it with the original. A certified copy is a copy the correctness of which is certified by the person in whose custody the original is, or some other authorised person.

Various modes are provided by statute in the case of different documents for authenticating certified copies by the seal, stamp, or signature of the certifying authority or person.

Formerly it was necessary to prove the genuineness of a certified copy; but now (by 8 & 9 Vict. c. 113, s. 1) it is enough if a certified copy purports "to be sealed or impressed with a stamp or sealed and signed or signed alone, as required, or impressed with a stamp, and signed as directed" by the respective Acts authorising the use of certified copies, without any proof of the seal or stamp, or of the signature, or of the official character of the person appearing to have signed it.

A list of the most important public documents proveable by examined or certified copies is given in *Wills on Evidence*, pp. 294-309; see also *Taylor on Evidence*.

Writs, records, pleadings, and documents filed in the High Court are proved by means of office copies (Order 37, r. 4). And in all proceedings in which affidavits may be used and have been filed, office copies of the same may be used (Order 38, r. 15). Copies appearing to be sealed with a seal of the Central Office are presumed to be office copies, and no signature or further authentication is required (Order 61, r. 7; see also *EXEMPLIFICATIONS*).

The following are general statutory provisions dealing with the proof of public documents:—

1 & 2 Vict. c. 94, ss. 12 and 13. Records in the custody of the Master of the Rolls proveable by copies sealed with the seal of the Record Office.

8 & 9 Vict. c. 113, s. 3; 45 & 46 Vict. c. 9, s. 1. Queen's printers' copies of private Acts and journals of Parliament and of Royal Proclamations admissible.

14 & 15 Vict. c. 99, s. 7. Foreign and Colonial Acts of State, judgments and judicial proceedings, etc., proveable by certified copies; *ibid.* s. 13, convictions and acquittals proveable by certificates of the clerk of the Court.

31 & 32 Vict. c. 37; 45 & 46 Vict. c. 9, s. 1. Proclamations, orders, and regulations of the Privy Council and Government Departments proveable

by copy of the *Gazette*, copy printed by Government printer or certified copy or extract.

42 & 43 Vict. c. 11. Bankers' books proveable by examined copy.

See The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 695), as to documents under that Act.

Evidence taken before Trial.—(a) *Evidence taken on commission* (see COMMISSION TO TAKE EVIDENCE).

(b) *Depositions in criminal cases* (see DEPOSITIONS and INDICTMENT).

(c) *Evidence taken in an action to perpetuate testimony* (see PERPETUATION OF TESTIMONY).

(d) *Evidence in former Proceedings.*—Where evidence has been taken in former proceedings between the same parties or their predecessors in title, such evidence may be used in a subsequent action if the witness cannot be produced owing to death, insanity, seclusion by the opposite party, or, in civil cases at least, owing to illness, disappearance, or absence from the jurisdiction (*Llanover v. Homfray*, 1881, 19 Ch. D. 224, 230; *Wright v. Doddem Tatham*, 1834, 1 Ad. & E. 3; *Strutt v. Boringdon*, 1803, 5 Esp. 56; *R. v. Seafie*, 1851, 17 Q. B. 230, 243; *R. v. Marshall*, 1841, C. & M. 238; R. S. C. Order 37, r. 3). It is also provided by Order 37, r. 25, that all evidence taken on the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

Evidence taken orally in Court may be proved in subsequent proceedings by reading the judge's note, or upon oath by the notes, or recollection of any person who heard it (*Mayor of Doncaster v. Day*, 1810, 3 Taun. 262; 12 R. R. 650).

Privilege.—Certain evidence is privileged—i.e. on grounds of policy a witness or a party in claiming the privilege is excused from giving the evidence which would otherwise be relevant and admissible.

Penal Consequences.—A party or witness cannot be compelled to give any evidence which would subject him to any punishment, penalty, forfeiture, or ecclesiastical forfeiture (*Redfern v. Redfern*, [1891] Prob. 139; *United States of America v. McRae*, 1867, L. R. 3 Ch. 79).

The privilege cannot be claimed by a witness on the ground that answering a question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit either at the instance of the Queen or of any other person (46 Geo. III. c. 37).

The witness claiming privilege must make his objection on oath (*Webb v. East*, 1880, 5 Ex. D. 108), and it is for the judge to decide whether the circumstances justify his claim.

The judge must insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril (*Ex parte Reynolds*, 1882, 20 Ch. D. 294).

Adultery.—No witness, whether a party or not in any proceeding instituted in consequence of adultery, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (32 & 33 Vict. c. 68, s. 3).

State Privilege.—When the production of a State paper would be injurious to the public interest, the head of the department having the custody of the paper may by himself or one of his subordinates claim the privilege of refusing to produce it; and the judge will generally be guided by his opinion in allowing the claim (*Beatson v. Skene*, 1860, 29 L. J. Ex. 430).

Husband and Wife.—No husband is compellable to disclose any com-

munication made to him by his wife, nor is any wife compellable to disclose any communication made to her by her husband, during the marriage (16 & 17 Vict. c. 83, s. 3).

Husbands and wives are also incompetent as well as not compellable to give evidence with regard to their having had or not had sexual connection with each other (see WITNESS, *Incompetency*).

Legal Professional Privilege.—A solicitor or barrister cannot be compelled to give evidence of communications made by his client to him in his professional capacity for the purpose of obtaining his advice and assistance (*Greenough v. Gushell*, 1833, 1 Myl. & K. 98; *Minet v. Morgan*, 1873, L. R. 8 Ch. 361; *Wheeler v. Le Marchant*, 1881, 17 Ch. D. 675). All evidence, reports, advice, and documents procured by or for a solicitor on behalf of his client for the purpose of litigation, whether actually begun or not, in which the client is or will be or has been concerned, are likewise privileged (*Southwark and Vauxhall Ry. Co. v. Quick*, 1878, 3 Q. B. D. 315; *Pearce v. Foster*, 1885, 15 Q. B. D. 114; *McCorquodale v. Bell*, 1876, 1 C. P. D. 471).

The client can waive this privilege; the legal adviser cannot (*Procter v. Smiles*, 1886, 55 L. J. Q. B. 527).

Privileged Admissions.—Admissions made to the opposite party in a civil case "without prejudice" are privileged (see ADMISSIONS; *In re River Steamer Co.*, 1871, L. R. 6 Ch. 822; *Walker v. Wilsher*, 1889, 23 Q. B. D. 335).

Title-Deeds.—A witness (other than a party) is not compellable to produce his title-deeds for inspection, or in Court, or to give evidence of their contents (*Harris v. Hill*, 1822, 3 Stark. 140; *Pickering v. Noyes*, 1823, 1 Barn. & Cress. 262; *Davies v. Waters*, 1842, 9 Mee. & W. 608). But a party is compellable to discover and produce his title-deeds if relevant to the action, unless they relate solely to his own case, and not to that of his opponent (14 & 15 Vict. c. 99, s. 6; *Minet v. Morgan*, 1873, L. R. 8 Ch. 361; and see DISCOVERY).

Admissions and Confessions are sometimes privileged (see ADMISSIONS and CONFESSIONS).

[*Authorities.*—For evidence generally, see Taylor, *Law of Evidence*, 9th ed.; Best, *Principles of Evidence*; Wills, *Law of Evidence*; Roscoe, *Nisi Prius Evidence*; Archbold, *Evidence in Criminal Cases*; Stephen, *Digest of the Law of Evidence*; Campbell's *Ruling Cases*, vol. xi.]

Exaction.—The term "exaction"—which is no longer in general legal use—signifies the wrong done by a public officer or one in pretended authority by taking a reward or fee for that which the law does not allow. It is distinguished by old writers from "extortion," which they treat as the taking by an officer of more than is his due or of what is not yet due, where something is or will be due (see *Termes de la Ley*—"Exaction," *Co. Lit.* 368; Jacob, *Law Dict.*, s.v. "Exaction"). But the word "extortion" is also used in a wider sense to denote any oppression under colour of office (see Russ. on *Crimes*, 6th ed., i. 423, and article EXTORTION).

Examination.—See WITNESS.

Examiners of the Court.—See COMMISSION, EVIDENCE ON.

Excavations.—Persons who, without statutory authority, make any excavation in a highway after its dedication, are liable to indictment for obstructing the highway (*R. v. United Kingdom Telegraph Co.*, 1862, 31 L. J. M. C. 166), but not to action, except by persons who have suffered particular damage by falling into the pitfall (*Ashby v. White*, 1 Sm. L. C., 9th ed., 268, 296).

Such statutory authority is possessed by gas and water companies, by the sewer and highway authorities, and by electric lighting companies acting under provisional orders. In each case, if the statutory authority is abused, or its restrictions disregarded, an indictment will lie for obstructing the highway. See HIGHWAYS.

Excavations on common land, not warranted by the custom of the manor, are actionable at the suit of any commoner whose rights are interfered with (*Ashby v. White, l.c.*).

Excavations on private land may, of course, be freely made by the owner, provided (1) that they are not traps or pitfalls for persons lawfully coming on the land, such as customers (see Beven, *Negligence*, 2nd ed., p. 524); (2) that they do not interfere with any right of support to land or buildings possessed by an adjoining owner (*Dalton v. Angus*, 1883, 6 App. Cas. 740); (3) that, if near enough to a highway to be dangerous to passengers in a town, they are properly fenced; (4) that, when near a street or highway in a town, proper fences and hoardings, erected in accordance with the statutes or by-laws applying to the town, are erected round the excavation, and under the licence of the local authority. The law on this subject is regulated in London by secs. 71, 75 of Michael Angelo Taylor's Act (57 Geo. III. c. xxix.), and secs. 121–123 of the Metropolis Management Act, 1855, and sec. 32 of the London Council (General Powers Act, 1890 (see Chit. Stat. Metropolis), and in the rest of England by sec. 80 of the Towns Police Clauses Act, 1847, and secs. 144, 149 of the Public Health Act, 1875, or by sec. 34 of the Public Health Act, 1890, where it is adopted.

In cases (1) and (2) the remedy is by action in respect of the injury suffered. In case (3) the remedy is by indictment for nuisance to the highway (Beven, *Negligence*, 2nd ed., p. 517), or action by the person injured. In case (4) by summary proceedings under the enactments specified.

There are also statutory provisions as to the proper fencing of such excavations as mines and quarries (see MINES AND MINERALS; QUARRY), and with reference to the mode of filling in excavations made for building in London. See LONDON (COUNTY).

[*Authorities.*—Beven on *Negligence*, 2nd ed., bk. iii. c. 1; Glen on *Highways*, 2nd ed., pp. 199, 234; Fitz-Gerald, *Public Health Acts*, 7th ed., 222.]

Excellency—A title of honour given to viceroys, ambassadors, and certain other members of the diplomatic corps. The title is also applied to officers while actually administering the government of a British colony.

This title was first assumed by ambassadors of high rank about the end of the sixteenth century, and was the occasion of many disputes as to prerogative at the Congresses of Münster and Osnabrück. Prior to this even emperors, kings, and reigning princes bore this title.

Thus Charlemagne is styled *Excellentissimus* in the capitularies, and later on the Emperors Conrad I., Frederick I., and Henry VII. are described as "Imperial Excellency." Queen Elizabeth of England in a letter addresses the Elector Christian I. of Saxony as *Excellentia Vestra*. With the rise of the term "Majesty" (*q.v.*) the use of "Excellency" by Sovereigns was

gradually discontinued. The first diplomatist who claimed the title of Excellency appears to have been Louis de Gonzaga, Duke of Nevers, sent by Henry IV. of France as ambassador to the Pope. His claim was based on personal grounds as a prince of the house of Mantua.

The ambassadors of Spain, Savoy, and Venice, not to be behindhand with France, also claimed this right, which was granted them by Pope Innocent X. Since the peace of Westphalia every ambassador of the first rank has been considered as entitled to be always addressed as Excellency in the exercise of their diplomatic functions.

[*Authorities.*—Alt., *Handbuch des Europäischen Gesandtschaftsrechtes*, Berlin, 1870, p. 113; Calvo, *Dict. de Droit International*, Paris, 1885.]

Except; Excepting; Excepted.—Where property is excepted out of a gift by will, the general rule of construction is that the exception carries as large an interest as the gift itself (*Doe d. Knott v. Lawton*, 1838, 4 Bing. N. C. 455; 7 L. J. C. P. 288).

A gift to A. B. by a testator of all his property, real and personal, except £500 a year to C. D., was held to entitle C. D. absolutely to so much capital as, being invested in Government securities, would produce that income (*Hill v. Potts*, 1862, 31 L. J. Ch. 380). In that case, Wood, V.C., stated the doctrine of the authorities to be, that in a gift to A. of all the property of a testator, except a particular property to B., the inference from the exception is that it was excepted solely for the purpose of giving it to B.; and therefore, if the gift to B. fails, the original gift takes place in its entirety, including the excepted property, which is taken to be only excepted for that purpose (see *Evans v. Jones*, 1846, 2 Coll. 516, for the authorities referred to).

Exception in Statute, Pleading.—1. In indictments for an offence created by statute it is held necessary to negative the existence of any exception, exemption, or proviso which would take the accused out of the penalty of the statute (*Archb. Cr. Pl.*, 21st ed.). In informations and complaints for matters which can be dealt with by a Court of summary jurisdiction it is sufficient to charge the offence or cause of complaint and to leave the defendant to bring himself within the exceptions (*Summary Jurisdiction Act*, 1879, 42 & 43 Vict. c. 49, s. 39).

2. In civil pleadings in an action for penalties the same rule obtained as in the case of indictments (*Thibault v. Gibson*, 1843, 12 Mee. & W. 94). Under the present Rules of Court no particular form is required in such cases, nor in any civil proceeding. See PENAL ACTION.

Exceptions, Bill of.—See ERROR, WRIT OF.

Excess of Jurisdiction.—The jurisdiction of a Court is its authority under the laws of the State in which it is established to hear and determine a particular class of matters or to make a particular order. If it goes beyond this authority it has exceeded its jurisdiction, and its proceedings are *coram non judge* (*The Marshalsea case*, 1612, 10 Co. Rep. 686). It is not possible here to consider in detail all the instances in which jurisdiction has been or may be held to have been exceeded; all that will be treated

are the consequences of exceeding jurisdiction, which vary with the status of the Court.

Where a foreign Court, or any British Court outside England, has assumed a jurisdiction recognised by its municipal law, but not by international law, its decisions, if operative in its own State or territory, are ignored as null by the English Courts, on the principle *extra territorium jus dicenti impune non paretur* (*McLeod v. A-G. for New South Wales*, [1891] App. Cas. 455; *Sirdar Gordyal Singh v. Rajah of Faridkote*, [1894] App. Cas. 670). On this subject see CONFLICT OF LAWS; FOREIGN JUDGMENTS.

Where the foreign Court has exceeded the jurisdiction accorded to it by its municipal law, an English Court, if satisfied of the fact, would treat the decision as null.

The High Court of Justice in England and the Court of Appeal and the House of Lords may in theory exceed their jurisdiction, but the legal remedy in such cases appears to be by appeal only in civil cases (*Companhia de Moçambique v. British South Africa Co.*, [1893] App. Cas. 602), and in criminal cases by writ of error. See APPEALS; ERROR, WRIT OF.

Where the House of Lords as a judicial tribunal exceeds its jurisdiction there is no legal remedy, and the matter must be settled by legislation or controversy between the two Houses of Parliament, as in the case of *Skinner v. Hon. East India Co.*

Action.—But where any Court, high or low, acts *wholly* without jurisdiction, whether the judges do or do not believe that they possess it, they are liable to an action for any damage sustained, usually in respect of illegal imprisonment, by the persons against whom the judgment is rendered, subject only to such protection, if any, as is given by the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), and the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) (*Calder v. Hallket*, 1839, 4 St. Tri. N. S. 482; *Houlden v. Smith*, 1850, 14 Q. B. 841).

Such a case would arise where a judge passed a sentence not authorised by law in respect of the offence proved. In such cases the act of the Court cannot be regarded as of a judicial nature or within the ordinary rules of judicial privilege, by which a judicial officer is protected from actions for erroneous judgments or for acting without jurisdiction, without knowing or having the means of knowing that he was exceeding his jurisdiction, or where the excess of jurisdiction arises from ignorance of facts which the parties have not brought before the Court (*Kemp v. Neville*, 1861, 10 C. B. N. S. 523; *Haggard v. Pelicier Frères*, [1892] App. Cas. 61). This and the other authorities on this subject are collected and fully discussed in Beven on *Negligence*, 2nd ed., 275–284, to which must be added the much controverted case of *Anderson v. Gorrie*, [1894] 1 Q. B. 668, which is to be regarded as firmly establishing the privilege of judges of Courts of record against actions for acts done in exercise of judicial office however improper, and for judgments however erroneous, provided they have jurisdiction of the cause in which the acts are done or the judgment given.

The difficulty which arises in each case turns on the questions (1) whether the judge had jurisdiction in the case either *simpliciter* or in certain events only; (2) whether he on erroneous findings of fact assumed to act in a case the true facts in which excluded his jurisdiction; (3) whether on the patent facts and (or) the law he had no authority whatever (a) to make the orders made, (b) to entertain the case at all. There does not seem to be any distinct authority to the effect that a judgment of the superior Court given wholly

without jurisdiction can be ignored and defied, and the judge who gave it or the officers of the law sued for trespass in attempting to enforce it on the property of the defendant; but so far as the judgment affects personal liberty, the right to sue the judge would appear to follow necessarily from concession that the sentence or order for imprisonment was wholly without jurisdiction (see *FALSE Imprisonment*). The judges of inferior Courts have frequently been sued, and sometimes with success, in respect of acts in excess of jurisdiction (*Houlden v. Smith*, 1850, 14 Q. B. 841).

Prohibition.—Where any Court other than the High Court of Justice or Court of Appeal entertains a matter which is outside its jurisdiction, the High Court can and will *ex debito justitiæ* restrain it by writ of *prohibition*. But error of judgment in matters within the jurisdiction of the Court is not ground of prohibition (*Grant v. Gould*, 1792, 2 Black. H. 69, 101). At one time it was usual for the Courts of common law to restrain by prohibition the Court of Admiralty and other Courts of particular jurisdiction. But with the fusion of law and equity and the amalgamation of Courts this power has been taken away as to all the Courts thus amalgamated. But it remains as to ecclesiastical Courts, military and naval Courts, and as to inferior or local Courts of civil jurisdiction, and as to justices of the peace acting in or out of sessions. But the remedy of prohibition is very rarely utilised as to the acts of justices in petty sessions. See *PROHIBITION*.

Certiorari.—Where an inferior Court gives a judgment or makes an order in excess of its jurisdiction, the appropriate remedy is usually by the writ of *certiorari*, by which the impugned order is brought into the High Court, examined and quashed, if, whether from erroneous findings of fact or error in law the Court below has assumed to act in excess of its jurisdiction (*R. v. Kent Justices*, 1890, 24 Q. B. D. 181). See *CERTIORARI*.

Appeal.—In cases where an appeal is allowed from the judgment of an inferior Court, the appeal can be utilised not merely to challenge errors of judgment, but also to quash judgments in which the Court below has exceeded its jurisdiction. See *APPEALS*.

Exchange.—Exchanges may be divided into three classes according to their mode of operation, viz. :—

- I. By the common law;
- II. By mutual conveyances;
- III. By order of the BOARD OF AGRICULTURE under the Inclosure Acts.

I. An exchange at common law is a “mutual grant of equal interests, the one in consideration of the other” (2 Black. Com. 323). Exchanges at common law are now obsolete. Such an exchange is made between two persons or two sets of persons and no more (*Provost of Eton College v. Bishop of Winchester*, 1774, 3 Wils. Ch. 468). The requisites for the validity of it are—

1. Identity of the “quantity of interest” exchanged, i.e. fee-simple for fee-simple, but not for life estate;
2. Identity in the “quality” of the subject-matter of the exchange, i.e. hereditaments for hereditaments, goods for goods;
3. The word “exchange” is the operative word and must be used;
4. Entry by both parties to perfect the conveyance; but livery of seisin is not necessary;
5. The exchange must be evidenced by writing in accordance with the

provisions of the Statute of Frauds, 29 Car. II. c. 3, ss. 1, 3. By the Real Property Act, 1845 (8 & 9 Vict. c. 106), a deed was made necessary for exchanges made after the passing of that Act.

The only other point that need be noticed concerning exchanges at common law is the implied warranty of title and right of re-entry in case of the eviction of either party. By virtue of this implied warranty the evicted party could re-enter into the possession of the lands originally belonging to him and given in exchange. But this incident of exchange was destroyed by the Act 8 & 9 Vict. c. 106, which provides (s. 4) that an exchange of any tenements or hereditaments made by deed executed after 18th of October 1845 shall not imply any condition in law (see Sheppard's *Touchst.* cap. xvi.).

II. Exchanges by mutual conveyances were subject to none of the inconveniences mentioned above, and indeed it was in order to avoid these that this latter form of exchange was principally employed (*Bartram v. Wichote*, 1833, 6 Sim. at p. 92).

III. Exchanges by the BOARD OF AGRICULTURE under the Inclosure Acts, as inexpensive and convenient, are much resorted to; and they may be made of lands not subject to be inclosed or as to which no proceedings for an inclosure are pending (8 & 9 Vict. c. 118, s. 147). But for this method of exchange to be available the inequality in value of the respective lands exchanged must not exceed one-eighth. The Acts affecting this method of exchange are the following:—

8 & 9 Vict. c. 118, ss. 92 and 147—"Inclosure Act, 1845."

9 & 10 Vict. c. 70, ss. 9 and 11—"Inclosure Act, 1846."

10 & 11 Vict. c. 111, ss. 4 and 6—"Inclosure Act, 1847."

11 & 12 Vict. c. 99—"Inclosure Act, 1848."

12 & 13 Vict. c. 83, ss. 7 and 11—"Inclosure Act, 1849."

14 & 15 Vict. c. 53.

15 & 16 Vict. c. 79, s. 17—"Inclosure Act, 1852."

16 & 17 Vict. c. 124.

17 & 18 Vict. c. 97—"Inclosure Act, 1854."

18 & 19 Vict. c. 52.

20 & 21 Vict. c. 31, s. 4—"Inclosure Act, 1857."

22 & 23 Vict. c. 43—"Inclosure Act, 1859."

31 & 32 Vict. c. 89—"Inclosure Expenses Act, 1868."

39 & 40 Vict. c. 56, ss. 2-7, 33—"Commons Act, 1876."

The powers contained in these Acts are vested in the Board of Agriculture by the Board of Agriculture Act, 1889, 52 & 53 Vict. c. 30, s. 2.

Exchanges of Settled Land.—Powers of exchanging settled lands are given to a tenant for life by the Settled Land Acts, such exchange to be for the best consideration in land or in land and money that can be reasonably obtained. But settled land in England must not be given in exchange for land out of England. See Settled Land Acts, 1882-1890; Settled Land Act, 1882, s. 4 (45 & 46 Vict. c. 38); and article, SETTLED LAND ACTS.

* [See Bythewood and Jarman's *Conveyancing*, 4th ed., vol. i. p. 520.]

Exchange, Bills of.—See BILLS OF EXCHANGE.

Exchange Contracts.—These are contracts made in the course of business in the Eastern markets, for the purpose of guarding against the fluctuations in the price of silver coin, by which a bank, or other financier, undertakes to pay to the merchant, within certain limits of

future time, sterling money, or its equivalent, in exchange for his silver, at a specified rate. It is a common condition or concurrent arrangement that the same bank which makes the exchange contract shall finance the goods, or, in other words, shall, in some shape or other, make advances to the merchant upon the security of the goods (see *Bank of China, etc. v. American Trading Co.*, [1894] App. Cas. 266).

Exchange of Livings.—See INCUMBENT.

Exchange, Rate of.—The rate of exchange in a foreign bill of exchange should be specified in the bill (Bills of Exchange Act, 1882, s. 9 (1)). An unauthorised subsequent indorsement specifying it is a material alteration (*Hirschfield v. Smith*, 1866, L. R. 1 C. P. 340). If no rate is specified, it is taken at the rate current on the day when the bill is payable (s. 72 (3)); see Chalmers on *Bills of Exchange*, 5th ed., pp. 27, 243. For the purpose of stamping, duty is calculated on the value on the day of date (Stamp Act, 1891, s. 6).

Exchanges (Regimental).—By Acts, which are still in force, viz. 5 & 6 Edw. VI. c. 16, 1551–52, intituled “Against buying and selling of offices,” and 49 Geo. III. c. 126, 1809, intituled “An Act for the prevention of the brokerage and sale of offices,” all officers in the army (in addition to other holders of public office) were prohibited from selling, or bargaining for the sale of, commissions therein, and from taking or receiving any money for the exchange of any such commissions under the penalty of forfeiture of the commissions, and being cashiered, as well as incurring other penalties.

The second of these Acts, however, exempted from the penalties of both Acts, purchases, or sales, or exchanges, of commissions for such prices as might be regulated, and fixed, by regulations to be made by the Sovereign.

The system of regulating the prices of commissions, and exchanges, continued until the Royal Warrant of 20th July 1871 which cancelled and determined all such regulations as from the 1st November 1871. The Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), immediately thereafter provided for the compensation of officers holding saleable commissions on the coming into operation of the Warrant.

The Regimental Exchange Act, 1875 (38 Vict. c. 16), enacted (s. 2) that Her Majesty might, by regulation, authorise exchanges to be made from one regiment or corps to another, on such conditions as might be expedient; and it was provided that nothing contained in the Army Brokerage Acts (which are defined as the above-mentioned statutes of Edw. VI. and Geo. III.) (s. 3) should extend to any exchanges made in manner authorised by any regulation for the time being in force.

Under present regulations, when officers apply to exchange, they must make declarations that the proposal does not originate in any cause affecting their honour, character, or professional efficiency, and that they intend to serve at least a year in the corps to which they propose to exchange.

The receiver of any sum agreed to be paid on exchange also declares that none of the officers of his present regiment, nor of that into which he proposes to exchange, except the officer with whom he is to exchange, have paid or promised to pay any money or money's worth to him, and that he

will not receive, or in any manner recognise, any such payment. The payer also declares to the like effect. Any false statement or breach of the undertakings so given are regarded as a violation of personal honour, and in every such case the provisions of the Statute 49 Geo. III. c. 126 would be rigidly enforced.

[*Authority.*—*Manual of Military Law*, War Office, 1894.]

Exchequer Bills.—Securities on which the Chancellor of the Exchequer is accustomed to borrow the moneys required to meet temporary emergencies, such as do not render it necessary to add to the funded debt of the nation. The issue of Exchequer bills is regulated by the Consolidating Act 29 & 30 Vict. c. 25. Unless the Treasury otherwise directs, each bill has two counterfoils, one to be retained by the Bank of England and one by the Comptroller-General. The bills bear such date and such interest (not exceeding $5\frac{1}{2}$ per cent.) as the Treasury may determine. The Act makes provision for the issue and registration of Exchequer bonds. By the 55 & 56 Vict. c. 26 the Exchequer bonds issued in respect of certain moneys advanced by the Commissioners of the National Debt are converted into a charge upon the Consolidated Fund.

Exchequer—

Chamber.—See SUPREME COURT.

Court of.— *Id.*

Division.— *Id.*

Practice.— *Id.*

As to Exchequer procedure in the High Court in Customs cases, see vol. iv. p. 79.

1. Upon the creation of the High Court of Justice, and the amalgamation of the superior Courts of common law, the practice on the plea side of the Court of Exchequer was wholly superseded by the practice under the Judicature Acts and the rules of the Supreme Court. The equity practice of the Exchequer ceased on the transfer of its equity jurisdiction to the Court of Chancery (see 5 Vict. c. 5, s. 17).

2. The practice on the Revenue side of the Exchequer remains as the practice of the Revenue side of the Queen's Bench Division, and is wholly unaffected, either by the Crown Office Rules or the Rules of the Supreme Court (38 & 39 Vict. c. 77, s. 17; R. S. C., 1883, Order 78, r. 1), except that Divisional Courts are substituted for the full Court of Exchequer (R. S. C., 1883, Order 59, r. 1 (*d*)). With the development of the Treasury Department and the creation of the Department of Inland Revenue much that was at one time done through the Court of Exchequer as a Court of accounts and receipts is effected without its assistance; and the fiscal functions of the old Barons of the Exchequer are not exercised by the judges who have succeeded them (see 2 *Chit. Gen. Pr. Law*, 1838, p. 389; 2 Mann, *Ec. Pr. App.* 249).

The legislation still in force as to Exchequer practice may be thus described. Under 33 Hen. VIII. c. 39, ss. 38, 51, Crown business is given priority in the Court, and the Court is empowered to fine sheriffs. On the change in the law as to the mode of levying fines, etc. (see *ESTREATS*), an appeal was given to the Court of Exchequer from rejection by the Treasury of claims to share the proceeds of the fines (3 & 4 Will. IV. c. 99, s. 36), and provision made (s. 32) for enforcement of fines, etc., by the QUEEN'S REMEMBRANCER, and for search of documents enrolled in the Court (s. 47).

Under 5 & 6 Vict. c. 86 a number of offices in the Court of Exchequer

were abolished as being rendered unnecessary by the transfer to the Court of Chancery of the equity jurisdiction of the Court (5 Vict. c. 5). The only sections still in force (8, 9) provide for the more speedy return of process and for the making of orders in Revenue cases by a single judge out of term time.

The Crown Suits Act, 1855 (18 & 19 Vict. c. 90), gives powers as to costs in Revenue cases and Crown suits in the Exchequer.

The Queen's Remembrancer Act, 1859 (22, & 23 Vict. c. 21), amended the Revenue practice, especially with reference to the duties of Queen's Remembrancer. Much of the Act is repealed (see 10 St. Rev., 2nd ed., 174). Rules were made under sec. 26 of this Act in 1860 and 1861 (2 St. R. & O., Revised, 637) to regulate the practice on the Revenue side of the Exchequer. Further rules made in 1863 were declared invalid in *A.-G. v. Sillem*, 1864, 10 H. L. 704. The rules of 1860, rr. 10–20, provide for the mode of taking bail on *capias* in a Revenue proceeding (r. 72), and for the form of bail. As to the practice with reference to Crown debts, see CROWN DEBTS. The Debtors Act, 1869, does not apply to Crown debts, and apart from the specific provisions of Revenue Acts (*e.g.*, 46 & 47 Vict. c. 55, s. 4) a Crown debtor who is in default may be arrested and imprisoned or held to bail (*A.-G. v. Edmunds*, 1870, 22 L. T. N. S. 667; *In re Smith*, 1877, 2 Ex. D. 47); and the Act of 1869, s. 4, expressly continues liability to imprisonment for default or paying penalties arising otherwise than for a breach of contract.

The Crown Suits Act, 1865 (28 & 29 Vict. c. 104), amended the procedure and practice on Crown suits in the Court of Exchequer with respect (a) to English informations, (b) proceedings at law on the Revenue side of the Exchequer, (c) as to other proceedings in which the Crown is interested, (d) the recovery of death duties. Rules were made under sec. 28 of this Act in 1866 (2 St. R. & O., Revised, 611).

The powers of the Barons of the Exchequer to make rules under these Acts, in the above matters and in other proceedings where the Crown is interested (28 & 29 Vict. c. 104, s. 46 (4)), were transferred in 1881 to the Rule Committee of the judges of the Supreme Court (44 & 45 Vict. c. 69, s. 6); but that body has not in any way exercised its authority on these subjects.

With respect to the practice as to enforcement of DEATH DUTIES, HOUSE TAX, INCOME TAX, CUSTOMS, EXCISE, and LAND TAX, see these titles.

It is doubtful whether an appeal lies to the Court of Appeal under sec. 47 of the Judicature Act, 1873, in proceedings for penalties in Revenue cases (*Howes v. Board of Inland Revenue*, 1876, 1 Ex. D. 385; *A.-G. v. Moore*, 1878, 3 Ex. D. 276). They would appear to be criminal matters.

[*Authorities*.—2 *Co. Inst.* 197; 3 *Black. Com.* 44; *Vin. Abr.* 6, 563; *Gilbard, History of the Exchequer*; *Madox, Hist. Exchequer*, 2nd ed., 1769; *Manning on Revenue Practice of Exchequer*, 2nd ed., 1827; *Price, Exchequer Practice*, 1830.]

Excise.

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HISTORICAL AND GENERAL INTRODUCTION.—Excise duties were first established in this country by an ordinance of the Long Parliament

made in 1643, which charged them upon beer, ale, cider, and perry, wine, and tobacco. These duties were afterward charged upon many other commodities, *e.g.* paper, soap, candles, malt, hops, sweets, etc., but the only existing duties of excise upon commodities are those upon beer, spirits, chicory, imitations of and substitutes for coffee and chicory, and coffee and chicory mixtures.

The amounts of duty realised in the United Kingdom from duties of excise upon commodities in the financial year 1896-97 were—

Spirits	£16,816,484
Beer	11,320,358
Chicory, etc.	3,294

It will be seen that the excise revenue proper is derived almost entirely from beer and spirits.

The excise revenue also includes duties upon a great number of licences. The beginning of these duties was in 1784, when, by the Act 24 Geo. III. c. 41, they were charged upon the makers and dealers in exciseable commodities therein mentioned. From time to time new licence duties have been created, and the area of excise taxation has been further increased by the transfer, in 1864, for greater convenience of collection, of several licences from the stamp revenue to the excise, and the conversion of the assessed tax on dogs into excise licences in 1867, and other assessed taxes into establishment licences in 1870. The revenue derived from excise licences of all descriptions was £3,876,656 in 1896-97. The following is a list of these licences:—

Appraisers.
Armorial bearings.
Auctioneers.
Brewers of beer for sale.
" " not for sale.
Beer dealers.
" " retail off.
Beer retailers on.
" " off.
Cider retailers.
Table beer, retailers off.
Beer and wine on.
" " off.
Distillers.

Establishment licences—
Male servants, carriages, hackney carriages, armorial bearings.
Game.
Gamekeepers.
Game dealers.
Guns, to use or carry.
Hawkers.
House agents.
Light locomotives.
Medicines, Patent.

Methylated spirit makers.
Methylated spirit retailers.
Occasional licences for—
Publicans, wine retailers, beer retailers.
Passenger boats.
Pawnbrokers.
" " plate.
Plate dealers.
Playing cards.
Refiners of gold or silver.
Rectifiers and compounders.
Refreshment house.
Spirit dealers.
" " liqueurs.
" " bottle.
Still or retorts.
Sweets dealers.
" retailers.
Theatre spirit licence.
Tobacco and snuff manufacturers.
" " dealers.
Vinegar makers.
Wine dealers.
" retailers on.
" " off.

Lastly, the railway passenger duty, which yielded £272,183 in the year 1896-97, is collected as excise revenue.

The foundation of the present system of control, as especially regards the excise revenue, is found in the Acts 7 & 8 Geo. IV. c. 53; 4 & 5 Will. IV. c. 51; and 4 Vict. c. 20; and amending Acts, sometimes called the Excise Management Acts. By the passing of the Summary Jurisdiction Act, 1879, and the Inland Revenue Regulation Acts, 1890, many of the sections of

these Acts have been repealed or become obsolete, or new provisions have been substituted, but many sections, especially those creating the powers of the officers of excise, and the regulations to which all excise traders must conform, remain very much as they were. Of these the most important are those relating to entry, survey, and the prohibition of the illicit manufacture of exciseable commodities, with regard to entry.

ENTRY.—All manufacturers of exciseable commodities except coffee mixtures and imitations of coffee; and all dealers in and retailers of intoxicating liquors, except retailers of table beer to be consumed off the premises, and all vinegar manufacturers and tobacco manufacturers, are required by 6 Geo. IV. c. 81, s. 10, or by the Acts relating to the different trades respectively to make entry. Entry is made by delivering to the proper officer such true and particular account of any house, building, place, vessel or utensil used in carrying on a trade or business as by the Acts relating to such trade or business is required (4 & 5 Will. IV. c. 51, s. 5). The entry is to be affixed in a book called the general entry book, the production of which is sufficient evidence of such entry made since the 12th August 1867 (30 & 31 Vict. c. 90, s. 12). No entry is legal unless made by a person who has attained the age of twenty-one years, and is the true and real owner of the trade or business; but the visible owner may nevertheless be prosecuted for duties, penalties, and forfeitures; and all stock-in-trade and materials and vessels found upon the entered premises are subject to and charged with such duties, penalties, and forfeitures (7 & 8 Geo. IV. c. 53, s. 20).

Vessels, too, are to be distinguished by letters or numbers, and fixed pipes are to be painted a uniform colour (s. 21).

The penalty for using any house, building, place, vessel or utensil without making entry is £200 for each house, building, place, vessel or utensil (4 & 5 Will. IV. c. 51, s. 6), and for fraudulently using entered premises for a purpose other than that for which they were entered, £100 (s. 7). Goods and vessels, etc., found in unentered premises are forfeited (4 Vict. c. 20, s. 6). Only one entry can be in force at a time for the same premises (4 & 5 Will. IV. c. 51, s. 8). If the trade or business is carried on by a joint-stock company, four directors, or if there are less than four, all the directors, must make entry, and they will be deemed to be the real owners of the business, and, as such, jointly and severally liable for all duties, penalties, and forfeitures (4 Vict. c. 20, s. 6).

SURVEY.—Simultaneously with the manufacture of exciseable goods or commodities arises the charge of duty upon them (4 & 5 Will. IV. c. 51, s. 11; 4 Vict. c. 20, s. 24). The charge is impressed, so to speak, upon the goods and commodities, together with all stills, backs, vats, coppers, cisterns, tables, presses, machines and machinery, vessels, utensils, implements, and articles for making or manufacturing such goods and commodities; and unless it can be shown that the duty has been paid, the goods and commodities are subject to seizure and forfeiture, and the penalty of double duty is incurred.

If the duty is in danger, and an affidavit to that effect is made in the Queen's Bench Division, an extent (*q.v.*) may issue against the trader and his property, or proceedings may be taken by collector's warrant (43 & 44 Vict. c. 20, s. 17; 43 & 44 Vict. c. 24, s. 48). If the officer under order of the Commissioners makes a demand for payment of duty upon exciseable goods, and the duty is not paid, the defaulter forfeits double the value of the duties (4 & 5 Will. IV. c. 51, s. 11), and if the duty is payable in the ordinary course of business, the penalty of double duty is incurred without

demand. In proceedings for double duty the notices need only be served twelve hours before the hearing of the information (4 & 5 Will. iv. c. 51, s. 19). Proof that duty has been paid lies upon the proprietor or claimer of any goods seized as not "duty paid" (7 & 8 Geo. iv. c. 53, s. 76).

The officers of Inland Revenue are empowered to enter at any time upon any premises where an excise trade is carried on; if between eleven at night and five in the morning, upon request and in the presence of an officer of the peace, and whether the premises are actually entered or not, to inspect such premises, take an account, and charge duty. This is called the power to survey, and the object of the regulation is to enable the officer to take an account of exciseable commodities, and to charge the duty thereon, of which he makes a memorandum in his survey book (7 & 8 Geo. iv. c. 53, s. 22). Upon the premises of the legitimate and entered trader is left a specimen paper in which the officer makes entries corresponding with those in his survey book for the purpose of checking by the trader. The survey books are returned to the chief officer in the course of official business, and are themselves evidence of the facts contained therein, in any proceedings touching a defendant's trade which is the subject of such entries, and it is not necessary to call the officers to substantiate them (*R. v. Grimwood*, 1 Price, 369).

If any exciseable goods or commodities, or any material, vessel, or utensil for making the same are deposited or concealed in any place with intent to defraud Her Majesty of any duty, the same are forfeited, and every person who shall remove, deposit, or conceal them, or be concerned in such removing, depositing, or concealing, shall forfeit treble value, or £100, at the election of the Commissioners (s. 32). Then, when an officer finds manufacturing any exciseable goods or commodities, or any materials for making the same, and shall also find any person knowingly aiding, assisting, or concerned in such manufacture, such person may be arrested and shall forfeit £30, and in default of payment may be committed to prison with hard labour for three calendar months; in the case of a second offence, the fine to be £60, and the imprisonment in default, six months (s. 33). Search warrants may be granted (s. 34), and officers can claim the assistance of all persons to help them (s. 35). Secs. 38 and 39, and 4 & 5 Will. iv. c. 51, s. 27, give concurrent powers in certain cases, and in suing for certain penalties, to the Commissioners of Excise and the Commissioners of Customs, and their officers respectively. Officers are to be protected from molestation, obstruction, and hindrance in making seizures in the execution of their duty (s. 39), and they may oppose force by force (s. 39). Secs. 41 and 42 contain obsolete provisions respecting the treatment of persons who resist officers, for which see ASSISTANCE TO EXCISE OFFICERS, *infra*, and INLAND REVENUE.

Proceedings with relation to the condemnation of seizures are dealt with under the head of PROCEDURE, *infra*; and see also INLAND REVENUE.

Procedure by excise information in summary proceedings and appeals to Quarter Sessions was created and regulated by the Excise Acts of 7 & 8 Geo. iv. c. 53, and 4 & 5 Will. iv. c. 87. The Summary Jurisdiction Act, 1879, and *R. v. Glamorganshire*, 1889, 53 J. P. 294, brought these proceedings into line with ordinary summary proceedings, under the Summary Jurisdiction Acts, saving certain special regulations, for which see INLAND REVENUE.

PERMITS AND CERTIFICATES.—The definition of permit contained in 23 Geo. III. c. 70, is a document "which for the better securing the duty chargeable upon exciseable commodities, the dealers therein are required to

take out from the proper officers of excise, certifying that those duties have been paid, which permits are to accompany such commodities from one part of the kingdom to another part thereof." Commodities not accompanied by a permit were seizable, and would be condemned and forfeited as commodities smuggled or illicitly manufactured, upon which duty had not been paid. By the Act 11 & 12 Vict. c. 121, spirit dealers and retailers were allowed to send out spirits accompanied by a less important document—the excise certificate for the removal of duty-paid spirits. Permits are only required now, saving exceptional cases, for the removal of spirits from distillers' stores or duty-free warehouses, and the removal of tobacco from a customs warehouse to the premises of a manufacturer of tobacco. The latter are customs permits. Certificates are required to be used by dealers in and retailers of spirits, under circumstances which appear under the head of SPIRITS, the law previously existing being now consolidated in the Spirits Act, 1880 (43 & 44 Vict. c. 24).

The provisions of the foregoing Act relating to permits are extended to certificates by 11 & 12 Vict. c. 121, s. 18. Sec. 158 of the Spirits Act, 1880 (43 & 44 Vict. c. 24), applies all previous Acts regulating the granting and using, etc., of permits and certificates, to permits and certificates granted and used under that Act.

EXCISE LICENCES.—The general provisions which govern excise licences are found in the Act 6 Geo. IV. c. 81, and amending Acts. The statutes relating to particular trades for which excise licences are required, and personal licences, such as establishment licences, licences to kill game, etc., generally contain special provisions, which are treated under the separate heads. See alphabetical list below.

The Act 6 Geo. IV. c. 81 is generally described as the Excise Licensing Act. It repealed the duties upon the then existing excise licences, and imposed other duties in lieu thereof, many of which have been repealed in their turn and new duties imposed. Where the duty is imposed according to the annual value of premises, the annual value is to be ascertained by the production of a certificate signed by the owner thereof, and also by the occupier where the occupier is not the owner. The certificate is to contain a statement of the true rent for which the premises are let, or if the premises are occupied by the owner, or the true rent is not for any reason reserved or payable, a statement of the estimated rent or true annual value.

If the person authorised to grant the licence is dissatisfied with the rent or value so certified, he is to adopt such other means as the Commissioners of Inland Revenue may direct to ascertain the true annual value, and the licence duty is to be paid thereon (6 Geo. IV. c. 81, s. 5, and see 4 & 5 Will. IV. c. 75, s. 9; 23 & 24 Vict. c. 107, s. 2; 43 & 44 Vict. c. 20, s. 43; and 44 & 45 Vict. c. 12, s. 15). The licences are to be granted by collectors and supervisors of Inland Revenue, and each licence is to contain the purpose, trade, or business for which such licence is granted, the name and place of abode of the licensee, the true date or time of granting such licence, and—except in the case of appraisers, auctioneers, or hawkers—the place at which the trade or manufacture is carried on (6 Geo. IV. c. 81, s. 7; 53 & 54 Vict. c. 8, s. 9). Two or more trades may be authorised on one set of premises by a combined licence (26 & 27 Vict. c. 33, s. 15), and persons in partnership (except auctioneers) need not take out more than one licence (6 Geo. IV. c. 81, s. 7). Partners are liable for the wrongful acts of each other (*R. v. Deane*, 13 Mea. & W. 39). 6 Geo. IV. c. 81, s. 17, provides that new beginners may take out licences for certain trades in an unexpired year by paying a proportionate part of the duty; but no person previously licensed can be

considered a new beginner, unless two years at the least have elapsed since the expiry of his old licence. Certain licences may be transferred to the executors or administrators, or the wife or child of a deceased person, or the assignee of a person removing from licensed premises, provided that the transferee is in occupation and makes a fresh entry (s. 21). The transferable licences are—

Brewers of beer for sale.	Medicines.
" " (private).	Passenger boats.
Beer dealers.	Pawnbrokers.
" " retailers off.	Plate dealers, refiners.
Beer retailers on.	Playing-card sellers.
" " off.	Refreshment house keepers.
Cider retailers.	Spirit dealers.
Table beer, retailers off.	" retailers.
Beer and wine on.	Still.
" " off.	Sweets dealers.
Distillers, rectifiers, compounders.	" retailers.
Gamekeepers.	Theatre (spirit retailers, etc.).
Game dealers.	Tobacco dealers.
Hackney carriages.	" retailers.
Methylated spirit makers.	Vinegar dealers.
" " retailers.	" retailers.

No one licence is to authorise any person to carry on his trade or business in more than one separate and distinct set of premises, adjoining or contiguous to each other, and held for the same trade or business and of which he shall have made entry, where entry is required; except auctioneers (6 Geo. IV. c. 81, s. 10) and appraisers and hawkers (53 & 54 Vict. c. 8, s. 9); but if the licensed premises are burnt down, or are rendered uninhabitable by fire or other unavoidable cause or accident, the excise licensing authority may by indorsement upon the licence authorise the licensed person to carry on his trade or business upon other premises in the same district or place, provided that the justices (in such cases as by law required) have given their licence for such use of the other premises (6 Geo. IV. c. 81, s. 11). An excise licence is not necessary for the sale of exciseable goods in an import warehouse, before payment of duty, in a quantity not less than one hundred gallons, if wines or spirits, and (under certain conditions) of other commodities (6 Geo. IV. c. 81, s. 12; 23 & 24 Vict. c. 113, s. 5; 30 & 31 Vict. c. 90, s. 17).

Upon the expiration and non-renewal of a justice's licence for the year for which the excise licence has been granted, a proportional part of the duty is to be returned (s. 24). Persons licensed, who also make entry, and tobacco dealers, must put up signboards or inscriptions containing name and trade upon their premises, under penalty of £20; if such signboard, etc., is put up by an unlicensed person he incurs a penalty of £20 (s. 25). Sec. 26 imposes penalties for carrying on the trades therein enumerated without licence. By sec. 27 the owner or occupier of premises where illegal sale is carried on, if privy or consenting thereto, is responsible for the penalties. If a licensed person does not produce his licence on demand of an officer, he forfeits £20 (s. 28). If any unlicensed person *solicits, takes, or receives* an order for goods for dealing in or selling which an excise licence is required, he forfeits the penalty appropriate to dealing in or selling such goods without licence (30 & 31 Vict. c. 90, s. 17). A person selling in contravention of the terms of his licence incurs the same penalty as the person dealing in or retailing such goods without licence (52 & 53 Vict. c. 42, s. 24). The provisions of all Excise Acts relating to penalties and forfeitures apply to all penalties and forfeitures (51 Vict. c. 8, s. 8).

In *Stallard v. Marks* (1878, 3 Q. B. D. 412) it was held that a licence was required for an office where no stock was kept, orders being received there, and the goods supplied direct to the purchaser from licensed premises. In *Killick v. Graham* (1890, 60 J. P. 534) it was held that the secretary of a watch club who, acting for a licensed dealer in plate, took orders for watches from the members of the club, was not a *bonâ fide* traveller within 30 & 31 Vict. c. 90, and required a licence.

Appraiser.—An appraiser for the purposes of the Excise Acts is a "person who shall value or appraise any estate or property, real or personal, or any interest in possession or reversion, remainder, or contingency in any estate or property, real or personal, or any goods, merchandise, or effects of whatsoever kind or description the same may be, for or in expectation of any hire, gain, fee, or reward or valuable consideration to be therefore paid him" (46 Geo. III. c. 43, s. 4). No person shall exercise the calling or occupation of an appraiser without taking out a licence authorising him so to exercise it (*ibid.* s. 5). Every licence shall state the true name and place of abode of the person taking out the same (*ibid.*). The sum of £2 is charged by way of duty "for and in respect of a licence to use and exercise the calling or occupation of an appraiser, to be taken out yearly by every person (except a licensed auctioneer) who shall exercise the said calling or occupation of an appraiser, who, for or in expectation of any gain, fee, or reward, shall make any appraisement or valuation chargeable by law with any stamp duty" (8 & 9 Vict. c. 76, s. 1). The licence expires on the 5th of July in each year, is not transferable, and is not issued for parts of a year (43 Geo. III. c. 43, s. 5). A penalty of £50 is imposed upon any person who acts as an appraiser without a licence, but a person not following the business of an appraiser, who in a single instance makes a valuation for the guidance and information only of the person employing him, is not required to take out the licence. A licensed auctioneer or a licensed house agent may carry on the business of a house agent without a special licence as an appraiser. Bailiffs or assistant bailiffs appointed by County Court judges may act as brokers and appraisers (51 & 52 Vict. c. 43, s. 33). See 46 Geo. III. c. 43; 5 & 6 Vict. c. 82; 8 & 9 Vict. c. 76; 24 & 25 Vict. c. 21; 27 & 28 Vict. c. 56.

Armorial Bearings.—"Armorial bearings" means and includes any armorial bearing, crest, or ensign, by whatever name the same shall be called, and whether such armorial bearing, crest, or ensign shall be registered in the College of Arms or not. Any person who shall keep and use any carriage, whether owned or hired by him, shall be deemed to wear or use any armorial bearings painted or marked thereon or affixed thereto (32 & 33 Vict. c. 14, s. 19). A licence is not required to be taken out by any person duly licensed by proper authority to keep or use any public stage or hackney carriage for any armorial bearings painted or marked on such stage or hackney carriage. The licence duty is £2, 2s. if to include use on a carriage, £1, 1s. if not. In *Milligan v. Cowan*, 1896, 60 J. P. 378, it was held in Scotland that the device upon a signet ring—a shield charged with lion rampant, surmounted by a crown with a bar at base of shield but no wreath—was an armorial bearing. See also ARMORIAL BEARINGS, vol. i. p. 321.

Auctioneers.—See AUCTIONEER, vol. i. p. 415.

Brewers.—See vol. ii. p. 241.

Beer, etc.—See BREWER, vol. ii. p. 241.

Carriage.—For the purposes of Excise, the term "carriage" means and includes any carriage (except a hackney carriage) drawn by a horse or

mule, or horses or mules, or drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam or electricity or any other mechanical power, but does not include a waggon, cart, or such other vehicle which is constructed or adapted for use and is used solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the Christian name and surname and place of abode or place of business of the person, or the name or style and principal or only place of business of the company or firm keeping the same, shall be visibly and legibly painted in letters of not less than one inch in length (51 Vict. c. 8, s. 4). A "hackney carriage" means any carriage standing or plying for hire, and includes any carriage let for hire by a coachmaker or other person whose trade or business it is to sell carriages or to let carriages for hire, provided that such carriage is not let for a period of three months or more (*ibid.*) In *Hickman v. Birch*, 1889, 24 Q. B. D. 172, the Queen's Bench Division held that an ordinary omnibus running along a fixed route is a "hackney carriage" within the meaning of the Act. In *Whitrow v. Brown*, 1892, 56 J. P. 374, where a farmer used a cart for husbandry but had not his name painted thereon, though it was intended to be so, and the justices dismissed the case, because there was no intention to defraud, the Queen's Bench Division held that the farmer was liable, and remitted the case for conviction. The duties on excise licence are as follow:—For every carriage, if such carriage shall have four or more wheels, and shall be drawn or be adapted or fitted to be drawn by two or more horses or mules, or shall be drawn or propelled by mechanical power, £2, 2s.; if such carriage shall have four or more wheels, and shall be drawn or be adapted or fitted to be drawn by one horse or mule only, £1, 1s.; if such carriage shall have less than four wheels, 15s.; for every hackney carriage, 15s. Every person letting a carriage for hire for less than one year is deemed to be the person keeping such carriage; and every person hiring any carriage for a year or any longer period is deemed to be the person keeping such carriage (38 Vict. c. 23, s. 11). Licences are not required for farm waggons or carts duly inscribed, used on Sunday, Christmas Day, Good Friday, or any day of public fast or thanksgiving, to take the owner or his family to or from any place of divine worship; nor for any carriage used without payment for the conveyance of electors to or from the poll at municipal and parliamentary elections. The Commissioners of Inland Revenue do not require licences to be taken out for the following vehicles:—Carriages kept but not used at any time within the year; brakes with four wheels and without any body, if used solely for breaking in horses; hearses, if duly inscribed and not used as or forming part of mourning coaches; mail carts used under contract with the post office, and so made as not to carry any passenger; carts used by rural postmen, provided no passenger is conveyed; and farm and trade carts to carry passengers (not the owner or his family) gratuitously on special occasions or holidays. See *Establishment Licences, infra*.

Chicory.—The licence duty on chicory is, for every hundredweight, raw or kiln-dried, 12s. 1d., and so on in proportion for any greater or less quantity than a hundredweight. By 23 & 24 Vict. c. 113, s. 8, dryers and roasters of chicory, and dealers therein, are to make entry with the Excise of their premises, kilns, utensils, etc., and no person other than a dryer, etc., who has made entry is to have in his possession more than 14 lbs. weight of such dried chicory, etc., under a penalty of £100. The duty on "vegetable matter" other than chicory has been repealed (45 & 46 Vict. c. 41, s. 5). A dryer before commencing is required to provide a warehouse properly secured, and approved by the Commissioners of Inland Revenue;

he is also required to give notice of his intention to dry, and to remove the chicory when dried. The chicory must be weighed in the presence of an officer of the Inland Revenue. The dryer must not have any dried chicory on his premises elsewhere than in the warehouse or kiln. The warehouse must not be open for delivery after 6 p.m. nor before 6 a.m., and the chicory must not be delivered from the warehouse unless in the presence of an officer, nor in less quantity than one hundredweight. A stock account is kept by the Excise, and the dryer is charged with duty on any deficiency, and should the deficiency exceed two per cent. he is liable to a penalty of £200. A dryer must provide sufficient and proper accommodation, to the satisfaction of the Commissioners, for the officers of excise. The penalty for breach is £100 (see 23 & 24 Vict. c. 113, ss. 9-20, 23).

Cider.—See vol. iii. p. 22.

Coffee Substitutes and Mixtures.—Excise duty of one halfpenny upon every quarter pound is chargeable on any article or substance prepared or manufactured for the purpose of being in imitation of, or in any respect to resemble or to serve as a substitute for, coffee or chicory, and also upon every quarter of a pound weight of any mixture of such article or substance with coffee or chicory which is sold or kept for sale (45 & 46 Vict. c. 41, s. 5). The duty is denoted by adhesive labels.

Distillers.—See DISTILLER, vol. iv. p. 290.

Dogs.—See DOGS, vol. iv. p. 336.

Drawback.—The drawback upon every 36 gallons of beer of an original gravity of 1055 degrees exported from the United Kingdom, or shipped for use as stores, is 6s. 9d.; and so on in proportion for any difference in quantity or gravity (43 & 44 Vict. c. 20, s. 36; 52 Vict. c. 7, s. 3). Any person may export beer in such casks or packages as may be prescribed (43 & 44 Vict. c. 20, s. 37). The drawback of the duties paid in respect of spirits is payable to rectifiers and compounders on British compounds rectified or compounded from duty-paid spirits, warehoused for exportation, ships' stores, or home consumption, except liqueurs, tinctures, medicinal spirits, or rectified spirits of wine; and similar drawback is payable on liqueurs, tinctures, medicinal spirits, and rectified spirits of wine, when warehoused for exportation or ships' stores (43 & 44 Vict. c. 24, s. 95). There are special regulations dealing with tinctures or medicinal spirits, flavouring essences, and perfumed spirits. On roasted coffee exported as ships' stores, the drawback is equal to import duty on raw coffee, namely, 14s. per cwt. On British manufactured tobacco, containing 14 lbs. of moisture in every 100 lbs., the drawback is 3s. 3d. per lb., and in proportion if moisture exceeds or is less than 14lbs. (50 & 51 Vict. c. 15, s. 3). On British manufactured snuff, containing inorganic matter not exceeding 18 lbs. in every 100 lbs., exclusive of waste, it is 3s. 3d. As to the prosecution of offences under sec. 4 of 50 & 51 Vict. c. 15, see *R. v. Ingham*, 1888, 21 Q. B. D. 47. See further, CUSTOMS, vol. iv. p. 80.

Establishment Licences.—Under this head are grouped licences to employ male servants, keep carriages, and wear or use armorial bearings. The duties are imposed for armorial bearings and male servants by 32 & 33 Vict. c. 14, s. 18, and for carriages by 51 Vict. c. 8, s. 4. The similar duties of assessed taxes were repealed by 32 & 33 Vict. c. 14, s. 16, and the new duties and licences declared to be excise duties and licences by sec. 18. The licences are annual licences, expiring on the 31st December of each year. The Commissioners of Inland Revenue are to prepare forms of declaration (s. 21), and every person becoming liable to any of the duties must fill up and sign a declaration before the expiration of the

month of January in each year, or within twenty-one days after first becoming liable to the duty, in which he is to state the particulars required by sec. 22. He must deliver the declaration, and pay the duties to which he shall appear by such declaration to be liable, to the person named therein. An additional declaration is to be made in the event of such person subsequently becoming liable to further duties (s. 23). The Commissioners may direct a special notice to be served upon any person, requiring him to fill up and sign a declaration left therewith, stating whether he is liable to the payment of any of the duties, and the particulars required by sec. 22, and to pay the duties within fourteen days from the date of service (s. 24).

The penalty for neglecting or refusing to deliver a declaration, or delivering an untrue declaration, is £20 (s. 25). The penalty for employing a male servant, etc., without having in force a proper licence, or employing more male servants, etc., than authorised by the licence, is £20 (s. 27); and if any question arises as to the number of servants employed or carriages used, or whether the defendant was entitled to any exemption, the *onus probandi* lies upon the defendant (*ibid.*). Certain persons, *e.g.* livery stable keepers, jobmasters, etc., may make entry of their premises, and must thereupon paint their names, and other words denoting their occupations, upon some conspicuous part of such premises (s. 28). The premises are then subject to inspection by any officer of Inland Revenue (penalty £20; *ibid.*), and they become entitled to the exemption from licence duty for any servant employed at such premises in the course of the trade carried on there, "other than a servant employed to drive a carriage with any horse let to hire for a period exceeding twenty-eight days" (s. 19 (5)). A person who shall have made entry of his premises in accordance with 32 & 33 Vict. c. 14, s. 28, is thus entitled to exemption for any servant employed by him in the course of his trade, other than a servant employed to drive a carriage with any horse let to hire for any period exceeding twenty-eight days, provided that such person shall have complied with all the provisions contained in the said section. The duty upon a licence to employ a male servant is 15s.

In *Yelland v. Vincent* (1883, 47 J. P. 230) justices found that a servant was *bona fide* employed both as groom and yardman, and it was held that upon this finding the above exemption did not apply. In *Yelland v. Winter* (1886, 50 J. P. 38) it was held that a licence was not required for a servant employed as yardman and groom, his duties as groom being subsidiary to those as yardman. In *Schultze v. Steel* (1890, 54 J. P. 232), decided in Scotland, it was held that a gardener employed at weekly wages, who worked for his employer on an average seven hours a day, and was at liberty to work for others, was not within the exemption.

Every livery stable keeper must enter in a book of account particulars of carriages standing at livery or otherwise on his premises, and every person furnishing any servant or letting any carriage on hire must enter the like particulars of such servants and carriages, such book to be open to the inspection of any officer of Inland Revenue, under penalty of £20 (s. 2). A coachbuilder who lends a carriage to a customer whilst the customer's carriage is being repaired is not chargeable for a licence to keep a carriage (*Davey v. Thompson*, 1886, 50 J. P. 260). If any person who has delivered a declaration does not pay the duty within the prescribed time (the month of January, or twenty-one days from first becoming liable), a special notice in writing may be served upon him personally, or at his usual or last-known place of abode, requiring him to pay the duties according to such declaration

within seven days. If he fails to pay, the collector of Inland Revenue may issue his warrant to distrain such person by his goods and chattels; and if no sufficient distress can be found, he may be committed to prison by the warrant of two Commissioners, there to remain until payment shall be made or he shall be released by order of the Commissioners.

The following persons are exempted from making declarations or taking out licences :—

1. Members of the Royal Family.
2. The sheriff of any county, or the mayor or other officer in any corporation or royal burgh, serving an annual office therein, in respect of any servants or carriages kept by him for the purposes of his office during his year of service.
3. Persons wearing by right of office any of the arms or insignia of members of the Royal Family, or of any corporation or royal burgh, in respect of the use of such arms or insignia.
4. Any person ordinarily residing in Ireland, and being a representative peer on the part of Ireland, or a member of the House of Commons, and not residing in Great Britain longer than during the session of Parliament, and forty days before and forty days after the session; or any person ordinarily residing in Ireland, but residing in Great Britain by the order of the Lord Lieutenant for the time being or of his Chief Secretary, for the purpose of public business, in respect of any servants, carriages, or armorial bearings employed, kept, or used by him, except in respect of any subject-matter of duty which shall be employed or used by such person in Great Britain during his residence in Ireland (32 & 33 Vict. c. 14, s. 19 (1) and (2)).

Game, etc.—See GAME LAW.

Guns.—See GUN.

Hawker.—See HAWKERS AND PEDLARS.

House Agents.—A house agent is a person who, as agent for any other person, shall, for or in expectation of fee, gain, or reward of any kind, advertise for sale or for letting any furnished house or part of any furnished house, or who shall by any public notice or advertisement, or by any inscription in or upon any house, shop, or place used or occupied by him, or by any other ways or means, hold himself out to the public as an agent for selling or letting furnished houses, and who shall let or sell, or agree to let or sell, or make or offer or receive any proposal, or in any way negotiate for the selling or letting of any furnished house or part of any furnished house; provided that no person shall be deemed to be such house agent by reason of his letting or agreeing, or offering to let, or in any way negotiating for the letting of any house not exceeding the annual rent or value of £25; provided also that any storey or flat rated and let as a separate tenement shall be considered to be a house for the purposes of the enactment (24 & 25 Vict. c. 21, s. 10). The excise duty on the licence, which expires on 5th July in every year and is not transferable, is £2. A licensed house agent is entitled to act as appraiser (*ibid.* s. 11). Landed estate agents, solicitors, licensed appraisers, and auctioneers are exempt from licence duty (*ibid.* s. 13). Penalty on house agents acting without a licence, £20 (*ibid.* s. 12).

Light Locomotives.—The words “waggon, cart, or other such carriage” occur in sec. 76 of the Highway Act of 5 & 6 Will. IV. c. 50; and it was held in *Danby v. Hunt* (1880, 5 Q. B. D. 20), decided upon that statute, that those words apply only to waggons and heavy vehicles *ejusdem generis*, and do not apply to a light spring cart used to convey a person's family from place to place, although frequently used for the conveyance of light agricultural implements.

In *Speak v. Powell* (1874, L. R. 9 Ex. 25; 43 L. J. M. C. 19), decided upon the repealed exemption in sec. 19 (6) of 32 & 33 Vict. c. 14, which was in terms very similar to those of the present statute, it was held that persons performing in a circus, who were carried round a town in vehicles in procession, were not "goods or burden" carried in the course of trade. In *Whitrow v. Brown* (1892, 56 J. P. 374), where a farmer used a cart for husbandry but had not his name painted thereon, though intended to be so, and the justices dismissed the case, but there was no intention to defraud, the Queen's Bench Division held that the farmer was liable, and remitted the case for conviction.

A hackney carriage means any carriage standing or plying for hire (see CAB), and includes any carriage let for hire by a coachbuilder or other person whose trade or business is to sell carriages or to let carriages for hire, provided that such carriage is not let for a period of three months or more. In *Hickman v. Birch* (1889, 24 Q. B. D. 172) the Queen's Bench Division held that an ordinary omnibus running along a fixed route is a "hackney carriage" within the meaning of the Act. The duties on excise licences are as follows: For every carriage, if such carriage shall have four or more wheels, and shall be drawn, or be adapted or fitted to be drawn, by two or more horses or mules, or shall be drawn or propelled by mechanical power, £2, 2s.; if such carriage shall have four or more wheels, and shall be drawn, or be adapted or fitted to be drawn, by one horse or mule only, £1, 1s.; if such carriage shall have less than four wheels, 15s.; for every hackney carriage, 15s. (51 Vict. c. 8, s. 4).

In *Flint v. Miller* (unreported) the Queen's Bench Division held that a carriage having a socket for a pole, the owner also possessing a pole and splinter bar, was "adapted or fitted" to be drawn by two or more horses or mules, and that a licence should be taken out at the £2, 2s. rate.

When a person commences to keep a carriage or a hackney carriage on or after the 1st October, he may, upon delivering a declaration to that effect, take out a licence which expires on the 31st December, upon payment of half the amount that would otherwise be payable (51 Vict. c. 8, s. 4). Every person letting a carriage for hire for less than one year is deemed to be the person keeping such carriage; and every person hiring such carriage for a year or any longer period is deemed to be the person keeping such carriage (38 Vict. c. 23, s. 11). Licences are not required for waggons or carts used for conveying the owner or his family to or from any place of divine worship on Sunday, or on Christmas Day, or on Good Friday, or on any day appointed for a public fast or thanksgiving, provided that such waggon or cart is otherwise used only for the conveyance of burden in the course of husbandry, and is duly inscribed (35 & 36 Vict. c. 20, s. 6); nor for carriages used without payment for the conveyance of electors to or from the poll at parliamentary (46 & 47 Vict. c. 51, s. 14) and municipal elections (47 & 48 Vict. c. 70, s. 10 (4)). A licence is not required for carriages kept but not used within the year.

With regard to such light locomotives as are liable to duty, either as hackney carriages or carriages under 51 Vict. c. 8, s. 4, an additional duty of excise is payable at the following rates:—If the weight of the locomotive exceeds one ton unladen, but does not exceed two tons unladen, £2, 2s.; if the weight of the locomotive exceeds two tons unladen, £3, 3s. (59 & 60 Vict. c. 36, s. 8 (1)); and such duty shall be paid, together with the duty on the licence, for the locomotive as a carriage or a hackney carriage (s. 8 (2)). See LIGHT LOCOMOTIVES.

Male Servants.—The term "male servant" means and includes any

male servant employed either wholly or partially in any of the following capacities:—Maitre d'hôtel, house steward, master of the horse, groom of the chambers, valet de chambre, butler, under-butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under-gardener, park keeper, gamekeeper, under-gamekeeper, huntsman, and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called (32 & 33 Vict. c. 14, s. 19 (3)). The term does not include a servant who, being *bonâ fide* employed in some other capacity, is occasionally or partially employed in any of the said duties, nor does it include a person who has been *bonâ fide* engaged to serve his employer for a portion only of each day, and who does not reside in his employer's house (39 Vict. c. 16, s. 5). In *Helsby v. Wintle*, 1895, 59 J. P. 309 n, the High Court held that a boy aged fourteen, employed in the house and garden, but chiefly as labourer in the garden, and not as gardener or under-gardener, and only occasionally as footman or page, was not a servant for whom a licence is required. Every person furnishing a male servant on hire is deemed to be the employer of the servant and liable to duty (32 & 33 Vict. c. 14, s. 19 (4)). Licences are not required in the following cases:—(a) By an officer in Her Majesty's army or navy for any servant, being a soldier in the army, or a person actually borne upon the books of a ship, and employed by such officer in accordance with the regulations of Her Majesty's service; (b) by any hotel-keeper, retailer of intoxicating liquor, or refreshment house keeper, for any servant wholly employed by him for the purpose of his business; (c) by any person licensed by the proper authority to keep or use any public stage or hackney carriage for any servant necessarily employed by him to drive such carriage, or in the care of such carriage, or of the horses kept and used by him to draw the same; and (d) by any horse dealer, livery stable keeper, or person who keeps horses for hire, or drawing any public stage or hackney carriage, for any servant employed by him in his business at his trade premises, where such horse dealer, or other person, shall have made entry and complied with sec. 28 of 32 & 33 Vict. c. 14; but duty must be paid for every servant employed to drive a carriage with any horse let for hire for any period of twenty-eight days. The persons mentioned as exempt from making any declaration, or taking out a licence for ARMORIAL BEARINGS, see *ante*, p. 112), are also exempt in respect of licence duty on male servants (32 & 33 Vict. c. 14, s. 19 (1) (2)). See *Establishment Licences*, *supra*.

Measures.—If any person exercising or carrying on a trade or business under, or subject to, any law of excise, and required to keep scales or weights or measures—(a) in the weighing of his stock or any goods, uses, or suffers to be used, any false, unjust, or insufficient scales or weight or measure, with intent to defraud Her Majesty of any duty of excise; or (b) before or after the weighing of his stock or any goods puts, or suffers to be put, any other substance thereto, whereby any officer of Inland Revenue may be hindered or prevented from taking a just and true account,—he shall for every such offence incur a fine of £100, and the false, unjust, and insufficient scales and weights and measures shall be forfeited (52 & 53 Vict. c. 42, s. 29). See **WEIGHTS AND MEASURES**.

Medicines.—Duty paid spirits may be used without licence by any physician, apothecary, surgeon, or chemist “in the preparation or making up of medicines for sick, lame, or distempered persons only” (16 Geo. II. c. 8, s. 12).

Medicines, Patent.—See **MEDICINE STAMPS**.

Methylated Spirit.—See SPIRITS.

Passenger Boats.—See PASSENGER BOATS.

Pawnbrokers.—See PAWNBROKER.

Plate Dealers and Refiners.—Licences to deal in plate are dated on the day on which they are issued, and expire on the 5th of July annually; they may be granted for proportionate parts of a year, and are transferable. The following are the excise duties on licences:—(1) By any person who shall trade in or sell any article composed wholly or in part of gold or silver, in respect of every house, shop, or other place in which his trade or business shall be carried on—(a) where the gold shall be above two pennyweights and under two ounces in weight, or the silver above five pennyweights and under thirty ounces in weight, the sum of £2, 6s.; (b) where the gold shall be of the weight of two ounces or upwards, or the silver of the weight of thirty ounces or upwards, the sum of £5, 15s. (2) By every person duly licensed as a hawker, pedlar, or petty chapman, who shall sell in the ordinary course of his trading as a hawker, pedlar, or petty chapman any article composed wholly or in part of gold or silver, the same duties as above mentioned according to the weight of the gold or silver. (3) By every pawnbroker who shall trade in or sell any article composed wholly or in part of gold or silver, or who shall take in pawn, or deliver out of pawn, any such article in respect of every house, shop, or other place in which his trade or business shall be carried on, the sum of £5, 15s.; and (4) by every refiner of gold or silver in respect of every house, shop, or other place as aforesaid, the sum of £5, 15s. Penalty for trading without a licence, £50. The term “gold,” for the purposes of excise duty, does not mean pure gold, but “gold” as alleged by the vendor (30 & 31 Vict. c. 90, s. 5); so that a goldsmith holding a licence on the lower scale is liable to a penalty if he sells an article as “gold” which weighs more than two ounces, though it does not contain two ounces of pure gold (*Young v. Cook*, 1877, 3 Ex. D. 101). A plate licence is not required by an auctioneer to sell plate by auction (8 Vict. c. 15, s. 6); this being the practice of the Commissioners of Inland Revenue, notwithstanding the enactment in 27 & 28 Vict. c. 56, s. 14 (by which licences to deal in plate were first made excise licences), that auctioneers are not to deal in or sell exciseable commodities except upon licensed premises; nor is a licence required for selling or receiving in pawn gold or silver lace, wire thread or fringe (30 & 31 Vict. c. 90, s. 4), nor for the sale of watch cases by makers (33 & 34 Vict. c. 32, s. 4). Unlicensed persons (not being *bonâ fide* travellers for licensed persons) soliciting orders are liable to a penalty. In *Killick v. Graham*, [1896] 2 Q. B. 196, where the secretary of a watch club received subscriptions, and to the winner of a ballot supplied silver articles obtained from a licensed trader, who paid the secretary a commission, it was held by the High Court that the secretary was not a *bonâ fide* traveller, and required a licence. See 30 & 31 Vict. c. 90.

Playing Cards.—See CARDS.

Rectifiers and Compounders.—See SPIRITS.

Refreshment House.—See REFRESHMENT HOUSE.

Spirits, etc.—See SPIRITS.

Still or Retorts.—See STILL.

Sweets, etc.—See SWEETS.

Theatre Spirit Licence.—See THEATRES.

Tobacco and Snuff.—See TOBACCO.

Vinegar Makers.—The duty on an excise licence to every maker of vinegar or acetous acid for sale is £1. The licence expires on the 5th of July in each year. The penalty for making vinegar or acetous acid for sale

without a licence is £100. See 6 Geo. IV. c. 81, ss. 16, 26; 7 & 8 Vict. c. 25, s. 3; 52 Vict. c. 7, s. 4.

Wine, etc.—See WINE.

PROCEDURE.—An information for an offence against the Excise Acts must be laid by order of the Commissioners in the name of an officer or the Attorney-General, except on immediate arrest (53 & 54 Vict. c. 21, s. 1), within six months (11 & 12 Vict. c. 118, s. 3), and the summons must be served ten days at least before the time appointed for the hearing (4 & 5 Will. IV. c. 51, s. 19). The Summary Jurisdiction Acts, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's revenue under the control of the Commissioners of Inland Revenue, apply to all informations, complaints, and other proceedings before a Court of summary jurisdiction, under and by virtue of any such statutes (42 & 43 Vict. c. 49, s. 53). The imprisonment in respect of non-payment or default of sufficient distress to satisfy a sum adjudged by a conviction is therefore regulated by sec. 5 of the Summary Jurisdiction Act, 1879; but when the sum adjudged by conviction exceeds £50, the imprisonment in respect of non-payment or default of sufficient distress may exceed three months, but shall not exceed six months (*ibid.*). The defendant must be informed of his right to be tried by a jury before the charge is gone into in cases where the imprisonment without fine may exceed three months.

All regulations, minutes, and notices purporting to be signed by a secretary or assistant-secretary of the Commissioners, and by their order, shall, until the contrary is proved, be deemed to have been so signed and to have been made and issued by the Commissioners, and may be proved by the production of a copy thereof purporting to have been so signed (53 & 54 Vict. c. 21, s. 24 (1)). In any proceeding the letter or instrument under which an officer acted is evidence (*ibid.* s. 24 (2)). Officers may conduct proceedings before justices (*ibid.* s. 27). Where proceedings were taken to recover an excise penalty by an officer before a Court of summary jurisdiction it was held that an allegation in the information that the officer prosecuted by order of the Commissioners was sufficient proof of such order without further or other evidence (*Dyer v. Tully*, [1894] 2 Q. B. 794; see also 7 & 8 Geo. IV. c. 53, s. 71; 53 & 54 Vict. c. 21, s. 21). In a prosecution for pursuing game without a licence, the information alleged that it was by order of the Commissioners, and objection was taken that no evidence was given thereof, which objection was allowed. The High Court held that the justices were wrong in allowing such an objection, and in ignoring 7 & 8 Geo. IV. c. 53, s. 71 (*Hargreaves v. Hilliam*, 1894, 58 J. P. 655).

If the penalty be imposed in respect of a first offence, the prescribed amount may be reduced (42 & 43 Vict. c. 49, s. 4), and in other cases the justices may mitigate the penalty to not less than one-fourth. The Commissioners may further mitigate fines and stay proceedings (53 & 54 Vict. c. 21, s. 35 (1)). The Treasury may mitigate or remit any fine or penalty either before or after judgment, and may direct anything seized to be restored to the proprietor or claimer thereof (*ibid.* s. 35 (2)). All fines, penalties, and forfeitures not otherwise legally appropriated are applied to the use of Her Majesty (*ibid.* s. 33). A previous conviction need not be charged in the information or summons; on proof of a previous conviction for the same offence justices have no power to reduce the fine below one-fourth of the prescribed penalty (*Murray v. Thompson*, 1889, 53 J. P. 70). With regard to the recovery of excise penalties, all the powers and provisions as respects penalties and forfeitures for the time being in force in any Act

relating to such revenue shall apply to such fine, penalty, or forfeiture, as fully and effectually as if the same had been specially enacted with reference thereto (51 Vict. c. 8, s. 8). See further, **INLAND REVENUE**.

APPEALS.—The procedure on appeal to Quarter Sessions in excise matters is regulated by the procedure prescribed by the Summary Jurisdiction Acts (*R. v. Glamorganshire Justices*, 1889, 22 Q. B. D. 628). As to costs on appeal, see *Lauder v. Evans*, 1881, 45 J. P. 288, and *Inland Revenue Commissioners v. Goodfellow*, 1888, 45 J. P. 588—cases at Quarter Sessions. Sec. 82 of the 7 & 8 Geo. IV. c. 53 gives the right of appeal to any person aggrieved (see **AGGRIEVED**) by a conviction or an acquittal. A case for the opinion of the High Court on a question of law may be stated under 20 & 21 Vict. c. 43.

ASSISTANCE TO EXCISE OFFICERS.—Justices, mayors, bailiffs, constables, and all Her Majesty's officers, ministers, and subjects serving under Her Majesty by commission, warrant, or otherwise are required to assist revenue officers in the execution of the law (7 & 8 Geo. IV. c. 53, s. 35). Constables and peace officers not assisting when required incur a penalty of £20 (4 & 5 Will. IV. c. 51, s. 16).

[*Authorities.*—See *Paterson's Licensing Acts*, 11th ed., by Mackenzie; Bateman, *Excise Officers' Manual*, 1865; Bell and Dwelly, *Laws of Excise*, 1873.]

Exciseable Liquor.—"Exciseable liquor is liquor subjected to the duties of Excise" (per Lord Campbell, C.J., in *Lancashire v. Staffordshire Justices*, 1857, 26 L. J. M. C. 171; see also 9 Geo. IV. c. 61, s. 37; 27 & 28 Vict. c. 64). The liquors at present subjected to the duties of Excise are spirits (23 & 24 Vict. c. 129, ss. 1, 5; 43 & 44 Vict. c. 20, s. 46; 53 Vict. c. 8, s. 6), beer (43 & 44 Vict. c. 20, ss. 11, 46; 52 & 53 Vict. c. 7, s. 3), mum, spruce or black beer (44 & 45 Vict. c. 12, s. 3), Berlin white beer (52 & 53 Vict. c. 7, s. 3).

Under 8 & 9 Vict. c. 109 power is given to justices to grant licences to persons keeping places (other than places licensed under the Alehouse Act, 1828) for public billiard tables, "provided that he (the licensee) put and keep up the words 'licensed for billiards' legibly printed in some conspicuous place near the door, or on the outside of the house, and do not wilfully or knowingly permit drunkenness or other disorderly conduct in the said house, and do not wilfully or knowingly allow the consumption of exciseable liquors therein by persons resorting thereto" (8 & 9 Vict. c. 109, ss. 10, 11, Sched. 3). A. was licensed under 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27, to sell beer, wine, etc., to be consumed in the house. He had allowed the consumption of beer by persons resorting to the house for the purpose of playing billiards, and was convicted of an offence against the tenor of his billiard licence. There was no excise duty on beer at the date of the conviction (1870). It was held that A. was wrongly convicted, as he had not sold "exciseable liquor" (*Jones v. Whittaker*, 1870, L. R. 5 Q. B. 541). Beer has since become an exciseable liquor (see *supra*); but it is provided by sec. 47 of 43 & 44 Vict. c. 20, that "the grant of a duty on beer shall not be deemed to bring beer within the expression 'exciseable liquors,' as contained in Sched. 3 to the 8 & 9 Vict. c. 109, with reference to a billiard licence." See **EXCISE**.

Exclusion.—**EXPULSION** (*q.v.*) supposes the obnoxious person on the soil; exclusion is the prevention of his ingress. Every independent State is

supreme master within its own boundaries, and as such entitled for its self-preservation to exclude foreigners; but, says Bluntschli, it "has not the right to forbid absolutely the entry of strangers upon its territory and, thus to cut off the country from foreign intercourse" (*Das moderne Völkerrecht*, Nordlingen, 1872).

"The exercise of the right," says Hall, "is necessarily tempered by the facts of modern civilisation. For a State to exclude all foreigners would be to withdraw from the brotherhood of civilised peoples; to exclude any without reasonable or at least plausible cause is regarded as so vexatious and oppressive, that a Government is thought to have the right of interfering in favour of its subjects in cases where sufficient cause does not in its judgment exist. . . ." "If," however, "a country decides that certain classes of foreigners are dangerous to its tranquillity, or are inconvenient to it socially or economically or morally, and if it passes general laws forbidding the access of such persons, its conduct affords no ground for complaint" (*Int. Law*, pp. 223, 224).

In the United States and Australia exclusion on a large scale has already been exercised, and in Great Britain official returns are periodically published as to the immigration of pauper aliens, and bills have been introduced for the purpose of restricting it. The extent of the right of exclusion has given rise to some controversy among European jurists; and the Institute of International Law (*q.v.*) in 1892 embodied the views of the majority of its members in a series of articles, of which the following are the most important:—

Art. 2. As a general principle, no State is entitled to forbid access to or sojourn upon its territory either to its own subjects or to those who having lost their nationality in such State have not acquired another.

Art. 6. The free entry of foreigners to a State cannot be generally and permanently forbidden except when the internal public good is concerned or for extremely grave reasons, such as a fundamental difference of manners or civilisation, or a dangerous organisation or accumulation of foreigners.

Art. 7. Protection to national labour is not of itself a sufficient motive for non-admission.

Art. 8. States have the right to restrict or to prohibit temporarily the entry of foreigners during time of war, internal disturbance, or epidemic.

Art. 12. Entry may be forbidden to every foreigner without visible means of support ("en état de vagabondage ou de mendicité"), or afflicted with a contagious disease, or strongly suspected of offences committed abroad against the life or health of persons or against public property or credit ("ou contre la propriété ou la foi publique"), or of foreigners condemned for such offences.

Exclusive—

Appointment.—Where the donee of a power of appointment among a class appoints to one or more of such class to the exclusion of others, this is called an exclusive appointment. Whether, prior to the passing of the statutes hereafter mentioned, the donee was enabled to make such an appointment was a question of construction in each case. In Farwell on *Powers*, 2nd ed., ch. viii., the cases will be found collected and discussed. Since the passing of the two statutes dealing with illusory appointments (1 Geo. iv. and 1 Will. iv. c. 46, and 37 & 38 Vict. c. 37) the learning on this subject has been rendered of small importance, for by the first of these Acts the appointment of any share, however unsubstantial, was made sufficient to prevent the exercise of the power being impugned as an exclusive appointment, and by the later Act it was enacted that no appointment should be invalid on the ground that any object of the power

was altogether excluded (s. 1), unless, indeed, in the instrument creating the power the amount of the share or shares was declared from which no object should be excluded, or some one or more object or objects should not be excluded (s. 2). See POWERS: ILLUSORY APPOINTMENTS.

Occupation.—An occupier to be rated to the poor law must be in exclusive occupation. Whether a person is in exclusive occupation or not is a question of fact to be determined in each case (per Lord Herschell, L.C., in *Holywell Union v. Halkyn Drainage Co.*, [1895] App. Cas. p. 125). In that case a landowner had granted to a company the exclusive right of drainage through a tunnel and watercourse on his land, with the right of placing works in the tunnel and watercourse, reserving to himself mineral and other rights, and it was held that the owner's rights were merely subordinate to those of the company, and that the company were in occupation of the tunnel and watercourse, and rateable in respect thereof. There are many other instances of two persons being in occupation at the same time, but one of them having the paramount, and the other only a subordinate, occupation; for example, a landlord and his lodger are both in occupation of the same house, but the occupation of the landlord being paramount and that of the lodger only subordinate, the former is, for rating purposes, considered to be in exclusive occupation. A mere licensee, such as the owner of a bookstall at a railway station (see *Smith v. Lambeth Assessment Committee*, 1882, 10 Q. B. D. 327), is not in exclusive occupation of premises so as to be rateable. See the cases on this subject collected in Mayer's *Law of Rating*, pp. 20–32.

Right of Burial.—Sec. 33 of the Burial Act, 1852, enables burial boards, under such restrictions and conditions as they think proper, to sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of their burial ground, as well as the right of constructing vaults with the exclusive right of burial therein, and the right of erecting monuments, etc., subject to the payment to the incumbent or minister of the parish of such fees as may be settled by the vestry with the approval of the bishop of the diocese, or, if none such have been settled, such fees as would have been payable on the grant of the like rights in the parish burial ground. Under this section a grave space may be granted to a person and his heirs, and the title in such a case will descend to the heir of the grantee and will not be vested in all the members of the grantee's family (*Matthews v. Jeffrey*, 1880, 6 Q. B. D. 290); but it seems there may be a grant to a person and his "family" resident in the parish (see *Magnay v. St. Michael, Rector*, 1827, 1 Hag. Ec. 48). The grant of such a right, which must be by deed (*Bryan v. Whistler*, 1828, 8 Barn. & Cress. 288), confers on the grantee the right to plant and ornament the grave (*Ashby v. Harris*, 1868, L. R. 3 C. P. 523).

The grant of the exclusive right of burial in cemeteries provided under the powers conferred by the Cemeteries Clauses Act, 1847, s. 44, is considered the personal estate of the grantee, and may be assigned by him or bequeathed by his will. Assignments must be by deed (s. 45), and must be registered with the clerk of the cemetery company (s. 46), as also must the probate of wills bequeathing such rights (s. 47).

Excommunication—An ecclesiastical punishment or censure, whereby the person against whom it is pronounced is, for a time, cast out of the communion of the Church. According to the canonists, excommunication is said to be of two kinds, the lesser and the greater. The lesser

excommunication consists in the deprivation of the offender of the use of the sacraments and divine offices. The greater excommunication is that whereby persons are deprived not only of the sacraments and divine offices, but of the society and conversation of the faithful.

Excommunication was formerly the sentence passed by ecclesiastical judges on persons guilty of obstinacy or disobedience, as for non-appearance, non-obedience to decrees of the Court, and especially for non-payment of costs. Now by the Ecclesiastical Courts Act, 1813, 53 Geo. III. c. 127, excommunication in all cases of contempt is discontinued; and in lieu thereof there is substituted a decree of contumacy, and consequent *significavit* (*q.v.*), whereupon a writ *de contumace capiendo* issues, subject to the same provisions as those formerly applied by 5 Eliz. c. 23 to the writ *de excommunicato capiendo*. The Act further provides that nothing shall prevent any ecclesiastical Court from pronouncing persons to be excommunicated as spiritual censures for offences of ecclesiastical cognisance. Both the statute law and the canons purport to inflict the censure of excommunication *ipso facto* in certain cases; but in these cases it would seem that a declaratory sentence is required (*Mastin v. Escott*, 1841, 2 Curt. 692). As to lawful cause of repulsion from the Holy Communion under the rubric or under the canons of 1603, see *Jenkins v. Cook*, 1876, 1 P. D. 80; see also PARISHIONER.

[*Authorities.*—Godophin, *Rep. Can.* 624; Gibson, *Codex*, ii. 1048; Stephens, *Law relating to Clergy*, i. 533; Phillimore, *Eccl. Law*, 2nd ed., ii. 1087.]

Excursion Trains.—Excursion trains are passenger trains not part of the ordinary passenger service of a railway company, but specially advertised to run between special places, and on special occasions, and on conditions varying from the terms ordinarily applicable to passengers. Thus one of the most usual special conditions is that the right of the passenger to carry a certain amount of personal luggage free of charge, which he has under the particular Acts under which railway companies are formed, shall, in travelling by an excursion train, be suspended; and that he shall not be allowed to take luggage. Such trains are, in fact, express trains, as being put on for special or express service, although in popular language, and in the ordinary usage of railway companies, “express trains” are those advertised in the ordinary manner in their time-tables, and subject to the usual regulations, but making certain journeys with fewer stoppages than the majority of the trains. That a railway company might give notice of the suspension of the statutory right to carry luggage free of charge, and that the passenger might waive the benefit of the provision, was held in *Ramsey v. North-Eastern Rwy. Co.*, 1863, 32 L. J. C. P. 244. It was also held in the same case that in those circumstances the passenger is liable to pay for the carriage of the luggage as goods as if an express contract had been made to carry them, should they be taken without the knowledge of the company; and in like manner the company has a lien on the goods until payment.

The rights and obligations of the company and passenger by an excursion train, except so far as may be agreed upon, are the same as in the case of ordinary passengers.

In *Burnett v. Great North of Scotland Rwy. Co.*, 1885, 10 App. Cas. 147, where a company had agreed with the proprietor of land to stop all passenger trains at a station erected on the land which he had conveyed to

it, the House of Lords held, on appeal from the Scottish Courts, that excursion trains, although they were passenger trains, yet, in the particular circumstances, materially differed from ordinary passenger trains, and were not within the obligation of the contract.

Excuss.—An old term for DISTRESS. Thus Ayliffe (*Pareygon Juris Canonici Anglicani*, 2nd ed., p. 272) says that “the person of a man ought not by the civil law to be taken for a debt, unless his goods and estate have been first excussed.”

Ex debito justitiæ, *i.e.* as a matter of right.—A phrase used to signify that parties have legal rights which must be allowed and enforced by the Courts, as administering justice according to law; and the refusal of which would involve an injustice in the sense of withholding what the law allows.

Executed—

Consideration.—See CONTRACT.

Fine.—See FINES and RECOVERIES.

Remainders.—See REMAINDERS.

Trust.—See TRUSTS.

Use.—See USES.

Execution—

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SCOPE OF ARTICLE.—In treating of execution in the High Court within the limited space at our disposal, it is not possible to do more than present an outline of the essential features of the subject. We do not propose to enter closely into matters of detail, nor to deal at any length with the history of the various writs now in use, nor with the scope and effect of the obsolete forms which they have superseded or survived, except so far as may be necessary to make clear our outline of the law and practice of execution as it stands at the present time.

EXECUTION ON JUDGMENTS OF THE HIGH COURT GENERALLY.—The general term “execution” is applied to the various modes provided by the practice and procedure of the Court for enforcing its judgments or orders.

“Execution is the obtaining actual possession of a thing recovered by

judgment of law, and is called the life of the law, and therefore in all cases to be favoured" (Bac. Abr. tit. "Execution" (A)). "*Executio est fructus, finis, et effectus legis*" (Co. Lit. 289). So long as any proceeding can be taken to obtain satisfaction of the judgment, the action remains a pending action (*In re Claggett, Fordham v. Claggett*, 1882, 20 Ch. D. at p. 653).

As has been pointed out by a modern writer on the subject, there was originally a considerable distinction between the methods in use for giving effect to judgments at law and those applicable to decrees of the Courts of equity. The primary remedy in Chancery was against the person, whilst a judgment at law bound the rights of the parties. The same writer cites with approval the following words of Lord Ellesmere:—"Note that a decree in Chancery doth not bind the right of the party, but only his person to obedience; that if he will not obey, the chancellor may commit him to ward until he do obey, and that is all which the chancellor may doe; but judgment given in the King's Court, Common Pleas, and other Courts of the common law, do bind the right of the party" (Edwards on *Execution*, pp. 1-7). In actions of debt and detinue, however, and certain other actions in which a special *capias ad respondendum* lay, the body of the defendant in an action at common law could be taken under a *capias ad satisfaciendum* to satisfy the judgment, after a writ of *feri facias* had failed to do so (Tidd, 9th ed., pp. 128, 1025).

By the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18, it was provided that all decrees and orders of Courts of equity for the payment of money should have the effect of judgments at law, and all remedies given to judgment creditors were made available for enforcing such decrees and orders. Since the Judicature Acts, the powers of the several Courts both at law and in equity having been transferred to the Supreme Court of Judicature, the modes of executing the judgments and orders of that Court in its various branches are governed by the procedure prescribed by the rules of Court which regulate the practice under the Acts.

The subject of execution is dealt with by several of the Orders embodied in the Rules of the Supreme Court, 1883. Order 42 treats of the subject generally, whilst Orders 43-48 inclusive deal with various modes of execution.

In cases not expressly provided for by Order 42 any right previously existing is saved, for by r. 28 it is provided that "nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever" (see as to this *In re Coney, Coney v. Bennett*, 1885, 29 Ch. D. 993).

By virtue of this provision the old rule at common law as to the issue of several writs of execution still obtains. A party suing out execution could have several writs of different kinds or several writs of the same kind to different counties, but he could not have more than one writ of one kind running at the same time in the same county (Tidd, 9th ed., p. 995); and this rule still applies both in the Chancery and Queen's Bench Divisions.

It may be noted in passing that every order of the Court in any cause or matter is enforceable against all persons bound thereby in the same manner as a judgment to the same effect (r. 24). Though, however, the "Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an order" (per Cotton, L.J., *Ex parte Chinery*, 1884, 12 Q. B. D. 342, where it was held that a garnishee order absolute is

not a final judgment within sec. 4 (1) (g) of the Bankruptcy Act, 1883). And it is the practice of the Court of Queen's Bench in Ireland to refuse registration under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), of an order of the High Court in England to pay money or costs.

For a very full summary of the various methods of enforcing judgments or orders, see Seton, 5th ed., pp. 369-373.

MODES IN WHICH EXECUTION MAY ISSUE.—Execution may issue—

A. *Against property.*

B. *Against the person.*

It is enforceable—

1. *By writ, which may issue, either without leave, or by leave of the Court.*

2. *By order.*

It may be either legal or equitable.

A. EXECUTION AGAINST PROPERTY.

1. *By Writ.*

Writs generally.—Execution by means of writs issuing out of the Court where the record was upon which they were founded (and which were termed judicial writs) was the method formerly adopted for enforcing a judgment at law, a method which, as we have already seen, was extended by statute to decrees of Courts of equity for payment of money; and a writ is still the most ordinary mode of execution against property.

Interpretation.—Under the Rules of the Supreme Court the term "writ of execution" includes writs of *fiery facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" means the issuing of any such process against his person or property as under the rules of Order 42 are applicable to the case (Order 42, r. 8).

Order for Payment of Money, how enforced.—The judgment creditor under an order for payment of money or costs is entitled to sue out one or more writ or writs of *fiery facias* or *elegit* to enforce payment, so soon as such money or costs shall be payable, subject to the following limitations:—(1) If the judgment is for payment within a period therein mentioned, no such writ can issue until after the expiration of such period; (2) the Court or judge may, at or after the time of giving judgment or making the order, stay execution (Order 42, r. 17); (3) if the judgment is subject to any condition or contingency (Order 42, r. 9).

Service of Judgment or Order.—No demand is necessary before issuing execution on any unconditional judgment or order, beyond such as is implied in effecting service thereof where the judgment is of such a kind as to require service. No service is necessary before issuing a *fiery facias* or *elegit* on a judgment in the old common law form "adjudged that the plaintiff recover from the defendant £ . . .," which is still retained for money judgments; nor on orders for payment of money or costs by a person to a person within a time fixed without relation to service (see *Land Credit Co. of Ireland v. Fermoy*, 1870, L. R. 5 Ch. 323); nor before issuing a writ of possession on a judgment for recovery of land (Order 47, r. 1). But service is necessary in all cases where the judgment or order directs any person to pay money into Court, or do any other act within a limited time (Order 43, r. 6); or to deliver up possession of any lands to some other person (Order 47, r. 2); or to pay money to some other person within a limited time after service.

Leave to Issue, where necessary.—In the following cases a writ of execution cannot issue without leave of the Court:—

(1) Where the judgment or order is conditional or contingent (Order 42, r. 9);

(2) Where six years have elapsed since the date of the judgment, or any change has taken place in the parties (Order 42, r. 23 (a));

(3) Where a husband is entitled or liable to execution upon a judgment for or against a wife (*ibid.* (b));

(4) Where a party is entitled to execution upon a judgment of assets *in futuro* (*ibid.* (c));

(5) Where a party is entitled to execution against the shareholders of a joint-stock company upon a judgment recovered against the company (*ibid.* (d));

(6) Where it is sought to enforce, by sequestration, a judgment against a corporation which has been wilfully disobeyed (Order 42, r. 31);

(7) Upon judgment against a firm, where execution is sought against a person other than one who has been served as a partner, and has failed to appear; or who has appeared as, or has admitted on the pleadings that he is, or has been adjudged to be, a partner (Order 48 a, r. 8).

Issue and Form of Writ.—A writ of execution is issued in the Central Office, or in any district registry in which the action is proceeding. Writs of execution on bankruptcy orders are issued in the Central Office (Bankruptcy Rules, 1886, r. 107). The writ must bear the indorsements prescribed by the rules, and the date of the day on which it is issued. No writ can be issued unless the judgment or order on which it is to issue is produced to the proper officer (Order 42, rr. 11–14). Care must be taken that the writ pursues the judgment both as to parties and as to subject-matter, inasmuch as errors in these respects may invalidate it (Daniell's *Ch. Pr.* p. 828; Chitty's *Arch.* p. 796). But, though the writ must on the face of it be for the full amount of the judgment, the indorsement thereon to the sheriff must only direct him to levy so much as is actually due.

Interest at the rate of £4 per centum per annum is recoverable on a judgment (Order 42, r. 16; 1 & 2 Vict. c. 110, s. 17). No higher rate is enforceable though the debt on which the judgment was recovered bore a higher rate (*In re Central European Ry. Co.*, 1876, 4 Ch. D. 34), unless there is an agreement between the parties that more than £4 per cent. shall be secured by the judgment or order (Order 42, r. 16).

Interest on costs runs from the date of the judgment in accordance with the old rule at law (*Landowners' West of England Co. v. Ashford*, 1884, 33 W. R. 41; *In re London Wharfing Co.*, 1885, 33 W. R. 836; *Taylor v. Roe*, [1894] 1 Ch. 413).

Duration and Renewal of Writ.—A writ of execution if unexecuted remains in force for one year from its date, but may be renewed by leave of the Court (Order 42, rr. 20, 21). And where no levy has been made under a writ for a year, it is the practice to allow a second writ to be issued as of course.

Delivery of Writ to the Sheriff.—The writ, having been issued, must be delivered to the sheriff (see SHERIFF), who must use all diligence to execute the same. In the event of the sheriff failing to proceed with due despatch, the execution creditor can serve him with a notice to make a return to the writ, and, on non-compliance with such notice, an order for committal of the sheriff may be applied for (Order 52, r. 11). As to returns to writs generally, see Chitty's *Arch.* pp. 815–824, 863; Edwards on *Execution*, pp. 56–64; Mather's *Sheriff Law*, *passim*.

THE WRIT OF FIERI FACIAS.

Where available.—The writ of execution most commonly resorted to is that known as a writ of *fiery facias*. In the year 1895 there were 14,212 writs of *fiery facias* issued in the High Court, as against 520 other writs of execution of all kinds. The *fiery facias* is available for the purpose of securing to a judgment creditor the fruits of his judgment, where it is for the recovery by or payment to him of money or costs (Order 42, rr. 1, 17). Separate writs may be issued for debt and costs, though the second writ must be to recover costs only, and cannot issue until the expiration of at least eight days from the date of issue of the first writ (Order 42, r. 18).

Under the present practice a writ of *fiery facias* has the same force and effect as before the Judicature Acts.

Origin of Writ.—At the common law there were, it would seem, two judicial writs only to which a judgment creditor could have resort, viz. the writs of *fiery facias* and *levari facias* (see Gilbert on *Executions*, pp. 13–32; *Bac. Abr.* tit. “Execution” (C)). The latter of these writs was abolished so far as civil proceedings are concerned by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146 (2).

The writ of *fiery facias* is a judicial writ of great antiquity. As to its history the reader is referred to Gilbert on *Executions*, pp. 13–26, and to the judgments in *Giles v. Grover*, 1832, 1 Cl. & Fin. 72, and see the notes to that case in *Ruling Cases*, vol. xi. pp. 621–627.

What can be seized.—At common law execution could be issued under this writ only against such goods of the judgment debtor as were capable of being sold. The sheriff was commanded by it to cause to be made of the goods and chattels (*de bonis et catallis*) of the debtor a sufficient sum to satisfy the judgment. Under it the sheriff could seize everything that is a chattel (including chattels real) in which the debtor had a legal title; mere equitable interests could not be taken under the writ. By sec. 12 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), the sheriff was empowered to seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money belonging to the execution debtor, and to pay any such money and bank notes to the execution creditor, and to hold any such securities for money as security for the amount directed to be levied. By this section bank notes and money seized under a *fiery facias* are placed upon the same footing as goods: they are not to be treated as the property of the execution creditor until handed over by the sheriff (*Collingridge v. Paston*, 1851, 11 C. B. 683); nor are they available to satisfy a *fiery facias* lodged with the sheriff against the execution creditor at the suit of a third person (*ibid.*: and see Shelford's *Real Property Statutes*, 9th ed., pp. 449, 450).

The decisions as to what may and what may not be seized under the writ are numerous (see the cases collected, Shelford, p. 450; Daniell's *Ch. Pr.* pp. 854–858; Chitty's *Arch.* pp. 845–860; Edwards on *Execution*, pp. 113–136).

Protected Property.—Certain effects of the execution debtor are protected from seizure by virtue of various statutory provisions. His wearing apparel, bedding, tools, and implements not exceeding in value £5 (8 & 9 Vict. c. 127, s. 8), and agricultural produce within 56 Geo. III. c. 50, are thus privileged. Nor can the rolling stock and plant of a railway be seized (30 & 31 Vict. c. 127, s. 4).

Goods when bound.—At common law the goods of the debtor were

bound from the date of the *teste* of the writ, so that, though sold *bond fide* and for valuable consideration after that date, they were, even in the hands of the purchaser, liable to be taken in execution, unless, indeed, they were sold in market overt (Bac. Abr. tit. "Execution" (I)). This produced inconvenience and uncertainty in trade; "for men abused the notion of the retrospect of the goods being bound by the *teste* of the writ to make sales uncertain; for they took out writs one under the other without delivering them to the sheriff, by which they bound the goods of their debtors, and consequently made their sales and all commerce uncertain" (Gilbert on *Executions*, p. 14). In order to remedy this condition of things it was provided by the Statute of Frauds (29 Car. II. c. 3), s. 16, that no writ of *fiери facias* or other writ of execution should bind the property in the goods of the debtor, but from the time that the writ should be delivered to the sheriff, under-sheriff, or coroners to be executed. And the officer was required on receipt of the writ to indorse upon the back thereof the day of the month or year whereon he received it. The statute only afforded protection to goods as between the execution creditor and third persons; and as between the execution creditor and the execution debtor the goods are still bound from the *teste* of the writ (see *Ex parte Williams, In re Davies*, 1872, L. R. 7 Ch. 314). "If the party die after the *teste*, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for this is not a charge of property by sale or for valuable consideration" (Bac. Abr. tit. "Execution" (I)). A further protection was extended to *bond fide* purchasers for value by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, which provided that no writ of *fiери facias* or other writ of execution, and no writ of attachment against the goods of a debtor shall prejudice the title to such goods acquired by any person *bond fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ, provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner. It will be seen that under this statute the test to be applied is whether there has been seizure under the writ, and not, as under the Statute of Frauds, whether there has been delivery of the writ for execution. Such is still the law, for, though sec. 16 of the Statute of Frauds, and sec. 1 of the Mercantile Law Amendment Act, were repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), yet their provisions are re-enacted by sec. 26 of that Act, with the addition to the requirements of sec. 16 of the Statute of Frauds that the sheriff must indorse the hour as well as the day of receipt of the writ.

Binding the Goods.—As to the meaning of the expression "binding the goods," see *Giles v. Grover*, 1832, 1 Cl. & Fin. 72; *Ruling Cases*, vol. xi. p. 549. The effect of delivery to the sheriff is not to pass any property in the goods, which remains in the debtor. Upon seizure the goods are *in custodia legis* (see *Jones v. Atherton*, 1816, 7 Taun. 56; 17 R. R. 442; *Woodland v. Fuller*, 1840, 11 Ad. & E. 859; *Union Bank of London v. Lemanton*, 1878, 47 L. J. Q. B. 409). But the sheriff has such an interest in the goods that in respect of them he can maintain an action of trespass or trover (*Wilbraham v. Snow*, 1669, 2 Saund. 47 a).

Concurrent Writs.—The execution creditor may issue separate writs of *fiери facias* into different counties, but great care must be taken that more is not seized under the several writs than is sufficient to satisfy the judgment debt (see *Lee v. Dangar*, [1892] 2 Q. B. 337).

Priority of Writs.—It is the duty of the sheriff to execute all writs lodged with him against the same execution debtor; in doing this he must have regard to the priority in which the writs were delivered to him, and must apply the proceeds of sale in satisfaction of the writ first delivered (see Chitty's *Arch.* p. 860; Mather's *Sheriff Law*, pp. 63–65).

As to priority of executions issuing out of the High Court and County Court respectively, see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 152.

Seizure.—It follows from the provisions with regard to *boni fide* purchasers, to which we have already called attention, and to the provisions of the Bankruptcy Act, 1890, to be hereafter mentioned, that actual seizure under the writ should take place at the earliest moment. The duty of the sheriff is to seize so much of the goods of the debtor as will be reasonably sufficient to satisfy the sum indorsed on the writ, and, under 8 Anne, c. 14, s. 1, if he have received notice of rent in arrear, he must also levy such arrears, not exceeding one year's rent (see *Gawler v. Chaplin*, 1848, 2 Ex. Rep. 503). As to what constitutes seizure, see Edwards, pp. 119, 120; and as to seizure generally, Mather, pp. 66–70.

For the purpose of effecting seizure, the sheriff must not break into the debtor's house, for "a man's house is his castle" (*Semayne's case*, 1604, 5 Co. Rep. 91; *Ruling Cases*, vol. xi. pp. 628–647; 1 Smith's *Leading Cases* (10th ed.), 99). The maxim only extends to the dwelling-house; therefore a barn or outhouse not connected with the dwelling-house may be broken into (*Ponton v. Browne*, 1661, 1 Sid. 186, approved in *Hodder v. Williams*, [1895] 2 Q. B. 663).

Conflicting Claims.—In the event of the sheriff being met by the claims of third parties to the goods seized, he should, unless authorised by the execution creditor to withdraw from possession, have recourse to the protection afforded by the procedure as to interpleader (see INTERPLEADER).

Sale.—After seizure the sheriff must retain possession, and, unless the claim be paid by the execution debtor, proceed to sell. Such sale must, where it takes place under an execution for a sum exceeding £20 (including legal expenses), be by public auction, unless the Court otherwise orders, and must be publicly advertised (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 145). As to obtaining leave of the Court to sell by private contract, see Order 43, rr. 8–15. As to sale generally, see Mather, pp. 84–87; Chitty's *Arch.* pp. 839–841.

Proceeds of Sale.—After sale the proceeds become the property of the execution creditor, subject to the claim of the sheriff for his fees and expenses, and to the provisions of the Bankruptcy Act, 1890, s. 11 (2), requiring the sheriff in case of sale under a judgment for a sum exceeding £20 to hold the proceeds for fourteen days. That and other provisions of the Bankruptcy Acts affecting executions are considered more fully below.

According to the terms of the writ, the sheriff is required to have the money and interest in Court immediately after execution to be paid to the execution creditor. In practice, however, the money is paid direct to the execution creditor, and after receipt of the proceeds of sale the sheriff can be sued for the amount of the levy as a debt due. Such an action must be brought within six years of the accruing of the cause of action (see the Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42), s. 3).

Return of Writ.—In form the writ requires the sheriff to make a return to it. In practice, however, this is seldom done, unless a notice under Order 52, r. 11, has been served on him requiring him to make such return.

In the event of his failing to make a return after being called upon to do so, he is in contempt, and is liable to attachment. In some cases it is necessary that there be a return. Thus, "where the full amount is not realised by the writ, and it is expedient to issue another writ to enforce payment of the remainder, it is essential that the first writ should be returned in order to recite the return in the fresh writ" (*Chitty's Arch.* p. 815).

Sheriffs' Fees and Expenses.—As to these, see *Sheriffs Act*, 1887 (50 & 51 Vict. c. 55), s. 20; *Order 31*, August 1888; *Annual Practice*, 1898, vol. ii. p. 239; *Mather*, pp. 505-519; *Edwards*, pp. 155-162; *Chitty's Arch.* pp. 821-830. The sheriff is not entitled to poundage unless he has actually seized under the writ (see the following authorities—*Nash v. Dickinson*, 1867, L. R. 2 C. P. 252; *Mortimore v. Cragg*, 1878, 3 C. P. D. 216; *Bissicks v. Bath Colliery Co.*, 1878, 3 Ex. D. 174).

Provisions of the Bankruptcy Acts.—The rights of the execution creditor as against the general body of the creditors of the execution debtor are restricted by various provisions of the Bankruptcy Acts.

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1, created a new act of bankruptcy by providing as follows:—

A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

Provided that where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue therein is finally disposed of, shall not be taken into account in calculating such period of twenty-one days.

The holding of the goods by the sheriff for twenty-one days is a new act of bankruptcy created by the statute, and defeats the claim of the execution creditor as against the trustee in bankruptcy (*Figg v. Moore*, [1894] 2 Q. B. 690; *Burns—Burns' Trustee v. Brown*, [1895] 1 Q. B. 324). The twenty-one days are to be reckoned by excluding the day on which the seizure takes place (*In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264).

Bankruptcy Act, 1883, s. 45, so far as it affects a writ of *fieri facias*:

- (1) Where a creditor has issued execution against the goods of a debtor, he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.
- (2) For the purposes of this Act an execution against goods is completed by seizure and sale.

As to the effect of this section, see *Vaughan Williams on Bankruptcy*, p. 208; *In re Hobson*, 1886, 33 Ch. D. 493. As to what amounts to completion by seizure and sale, see the cases collected, *Vaughan Williams*, p. 210.

Bankruptcy Act, 1890, s. 11:

- (1) Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received, in part satisfaction of the execution, to the official receiver; but the costs of the execution shall be a first charge on the

- goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.
- (2) Where, under an execution in respect of a judgment for a sum exceeding £20, the goods of a debtor are sold, or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been
- presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor.

The above provisions take the place of subsecs. (1) and (2) of sec. 46 of the Bankruptcy Act, 1883 (see Vaughan Williams on *Bankruptcy*, p. 211). Where goods were seized by the sheriff, and afterwards notice was given to him of a receiving order against the execution debtor, but no request was made to him by the official receiver to deliver the goods to him, it was held that he was justified in proceeding to a sale (*Woolford's Trustee v. Lery*, [1892] 1 Q. B. 772).

As to what are "costs of execution," see *In re Wells & Croft*, 1893, 68 L. T. 231; *In re Harrison, Ex parte Sheriff of Essex*, [1893] 2 Q. B. 111. They do not include poundage (*In re Ludmore*, 1884, 13 Q. B. D. 415). As to the costs of a previous abortive execution, see *In re Long*, 1888, 20 Q. B. D. 316, and cases there cited.

Payment by a third person to prevent possession being taken of the debtor's goods is not within the section, and the money therefore will not belong to the trustee in bankruptcy (*Baer v. Hett*, [1895] 2 Q. B. 337).

As to execution in respect of a judgment for a sum not exceeding £20, the authorities under the corresponding section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 87), which differed slightly in terms, and under which the limit was £50, may be usefully consulted (see *Ex parte Liverpool Loan Co.*, *In re Bullen*, 1872, L. R. 7 Ch. 732; *Ex parte Reya*, *In re Salinger*, 1877, 6 Ch. D. 332; *In re Hinks, Ex parte Berthier*, 1878, 7 Ch. D. 882; *Turner v. Bridgett*, 1882, 8 Q. B. D. 392; *Mostyn v. Stock*, 1882, 9 Q. B. D. 432; *Jones v. Parcell*, 1883, 11 Q. B. D. 430; and see Vaughan Williams on *Bankruptcy*, p. 212; Mather's *Sheriff Law*, p. 362).

Where there are several executions, of which some are over and some under the statutory limit, the writs will be satisfied in order of priority, and such only as are under £20 will be entitled to payment (*In re Pearce, Ex parte Crossthwaite*, 1885, 14 Q. B. D. 966).

The fourteen days mentioned in the section run from the date of the completion of the sale by the sheriff, and not from the date of the receipt by the sheriff of the proceeds (*In re Cripps, Ex parte Ross*, 1888, 21 Q. B. D. 472).

Where the sheriff within the fourteen days had notice of a bankruptcy petition by another creditor, and after the fourteen days, but before a receiving order had been made, the debtor died, and a third creditor obtained an administration order under sec. 125 of the Bankruptcy Act, 1883 (of which he gave the sheriff notice), it was held that the title of the execution creditor prevailed over that of the trustee in bankruptcy (*Watkins v. Barnard*, [1897] 2 Q. B. 521).

Bankruptcy Act, 1883, s. 46 (3):

An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy; and a person who purchases goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy.

Bankruptcy Act, 1883, s. 145:

Where the sheriff sells the goods of a debtor under an execution for a sum exceeding £20 (including legal incidental expenses), the sale shall, unless the Court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale.

Where the sheriff, with the assent of the execution debtor, sold the goods by private contract, the sale was held irregular only, and valid against a subsequent execution creditor until set aside (*Crawshaw v. Harrison*, [1894] 1 Q. B. 79).

Bankruptcy Act, 1890, s. 12:

Where any goods of a debtor are taken in execution, and the sheriff has notice of another execution or other executions, the Court shall not consider an application for leave to sell privately until the notice directed by rules of Court has been given to the other execution creditor or creditors, who may appear before the Court and be heard upon the application.

Prior to the Act of 1890 it was held that the application could be made by the execution creditor *ex parte* (*Hunt v. Fensham*, 1884, 1 Q. B. D. 162). See R. S. C. Order 43, rr. 8–15.

Writs in Aid.—By R. S. C. Order 43, r. 5, it is provided as follows:—“Writs of *venditioni exponas*, *distringas nuper vice-comitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or *elegit* may be issued and executed in the same cases and in the same manner as heretofore.”

(1) *Venditioni exponas*.—“Where, upon the return to a writ of *fieri facias*, it appears that the sheriff or other officer has by virtue of such writ seized, but not sold, any goods of the person directed to pay a sum of money or costs, the person to whom such sum of money or costs is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas*” (Order 43, r. 2).

This writ is not a process distinct from a *fieri facias*, but a part of it; it is a writ directing the sheriff to execute the *fieri facias* in a particular way (*Hughes v. Rees*, 1838, 4 Mee. & W. 468). For the proceedings under this writ, see Daniell's *Ch. Pr.* p. 861; Chitty's *Arch.* pp. 865–868; Edwards, 143–145; Mather's *Sheriff Law*, 117–120.

(2) *Distringas nuper vice-comitem*.—This writ may be issued if the sheriff goes out of office after having made a return that he has seized the goods which remain in his hands for want of buyers. The writ is directed to the present sheriff, and requires him to distrain the late sheriff to sell the goods (Daniell's *Ch. Pr.* p. 862; Chitty's *Arch.* pp. 867, 868; Edwards on *Execution*, p. 145; Mather's *Sheriff Law*, pp. 121, 122).

(3) *Fieri facias*, and *sequestrari facias de bonis ecclesiasticis*.—Where, upon the return to a writ of *fieri facias*, it appears that the judgment debtor is a beneficed clerk, and has no goods or chattels nor any lay fee in the sheriff's bailiwick, the judgment creditor is, immediately after the return has been filed, at liberty to sue out one or more writs of *fieri facias de bonis ecclesiasticis* or one or more writs of sequestration (Order 43, r. 3). Before either of these writs can issue it is essential that there should be a return to the *fieri facias*.

The writs are delivered to the bishop to be executed by him. For the practice under the writs the reader is referred to Chitty's *Arch.* pp. 1176–1181; Edwards on *Execution*, 199–208.

In case of the bankruptcy of a clergyman, the trustee may apply for

sequestration of the profits of the benefice, and such sequestration has priority over any other sequestration issued after the commencement of the bankruptcy in respect of a debt provable in the bankruptcy, except one issued before the date of the receiving order by or on behalf of a person who, at the time of issue thereof, had no notice of an available act of bankruptcy committed by the bankrupt (Bankruptcy Act, 1883, s. 52; Vaughan Williams on *Bankruptcy*, p. 231).

THE WRIT OF ELEGIT.

Where available.—We have seen that a judgment creditor can on a judgment or order for payment of money or costs reach the goods of the judgment debtor by means of a *fieri facias*. Where it is necessary to resort to the debtor's land for the purpose of satisfying the judgment, a writ of *elegit* must be issued. Such a writ is within the several provisions of R. S. C. Order 42, which have been already referred to in dealing with the writ of *fieri facias*. Rules 1, 3, 4, and 5 of Order 43, to which reference has also been made, apply as well to the case of an *elegit* as to that of a *fieri facias*. An *elegit* may be issued in all cases where a *fieri facias* lies, either in lieu of a *fieri facias*, or together with it, or for the residue remaining after the judgment creditor has failed to realise the whole of his debt under a *fieri facias*. But if once lands be extended under an *elegit* no other writ of execution may issue (see Tidd, 996). "And though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because it may in time come out it" (Bac. *Abr. tit. "Execution"*; and see *Hele v. Bexley*, 1853, 17 Beav. 14). These considerations lead to the conclusion that the creditor should exhaust his remedy against the goods of his debtor before proceeding to that against his land. The method of executing an *elegit* is much more cumbrous and costly than is the case with regard to a *fieri facias*.

Origin and Growth of Writ.—The writ of *elegit* is a judicial writ of less antiquity than that of *fieri facias*, but dating back to the time of Edward the First. It is a creature of the statute to which it owes at once its origin and its name. "The writ is given by Westm. 2, c. 18, for by common law the land was not liable to any debt, not only because the debt was contracted upon the personal security, but also that the lord might not have a stranger put upon him; but those only were to enjoy the land who came by feudal dominion; but this statute gave election to the plaintiff to sue a writ *de fieri facias de bonis et catallis*, or that the sheriff should deliver to him all the goods and chattels of the defendant, *præterea boves et afros de carruch, et medietatem terræ suæ quousque debitum fuerit levatum per rationabile pretium et extantum*" (Gilbert on *Executions*, pp. 32, 33).

We have seen, in considering the writ of *fieri facias*, by what slow and tedious stages the present position of the judgment creditor and of the purchaser for value without notice, with regard to the goods of the judgment debtor, has been reached. No less gradual has been the progress of legislation affecting the right of the creditor to take in execution the lands of his debtor. From the Statute of Westminster to the Statute of Frauds (a period of about four hundred years), the law on the subject was governed by the provisions of the earlier of those two enactments, under which the writ was available against the goods and chattels and a moiety of the lands and tenements of the defendant. Under the statute legal interests in land only were extendible. By the Statute of Frauds (29 Car. II. c. 3), s. 10, the sheriff was empowered to deliver execution of lands, tenements, rectories, tithes, rents, and hereditaments held in trust for the execution debtor.

The last stage of the long journey was only reached after the further lapse of nearly two hundred years, and the rights of the *elegit* creditor against the lands of the debtor settled in their present shape. It is scarcely too much to hope that the day is not far distant when a system so little suited to modern requirements may be replaced by one simpler and less costly.

1 & 2 Vict. c. 110, s. 11.—By sec. 11 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), the operation of the writ was largely extended. The section is in the following terms :—

And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law : Be it therefore further enacted that it shall be lawful for the sheriff or other officer to whom any writ of *elegit* or any precept in pursuance thereof shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered in any action in any of Her Majesty's Superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seized or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out ; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution shall accordingly be held and enjoyed by the party to whom execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a Court of equity ; provided always that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable, and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued ; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied.

The effect of this section was to extend the remedy provided by the writ to *all* the lands of the debtor instead of limiting it to one-half only, and to make it available against copyholds (which could not formerly be extended), against rectories and tithes (which has been held to apply to lay rectories and tithes only (*Hawkins v. Gathercole*, 1854, 6 De G., M. & G. 1)), held by or in trust for the debtor, and against lands over which the debtor has a disposing power.

As to what interests in land may and what may not be taken under an *elegit*, see Daniell's *Ch. Pr.* pp. 868, 869 ; Chitty's *Arch.* pp. 877–880 ; Shelford's *Real Property Statutes*, pp. 447, 448 ; Anderson on *Execution*, pp. 372–378 ; Edwards on *Execution*, pp. 175–183 ; Mather's *Sheriff Law*, pp. 108–112 ; *Ruling Cases*, vol. xi. pp. 677, 678.

Equity of Redemption.—Some equitable interests cannot be extended. Thus an equity of redemption cannot be taken under the writ. "The *Statute of Westminster* was extended by the *Statute of Frauds* only to the case of pure equities, that is, where there was a bare trust, and not an estate

like an equity of redemption" (per Jessel, M. R., *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. pp. 283, 284). In such case the judgment creditor must have recourse to the process known as equitable execution, and obtain the appointment of a receiver (see *infra*, EQUITABLE EXECUTION).

By virtue of the Judgments Act, 1855 (18 & 19 Vict. c. 15), s. 11, mere legal estates vested in purchasers or mortgagees cannot be taken in execution under an *elegit*.

Not now available against Goods.—In the case of *Ex parte Abbott, In re Gourlay* (1880, 15 Ch. D. 447), it was held that a creditor who had seized goods under an *elegit* was, from the time of the seizure, a secured creditor under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 16 (5). But by sec. 146 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is provided that the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods. As to this section, *Hough v. Windus* (1884, 12 Q. B. D. 224) may be consulted.

Concurrent Writs.—Where the debtor has lands in more than one county the execution creditor may issue a writ of *elegit* into each county.

Priorities.—As between competing writs the creditor who has first lodged his writ with the sheriff has priority over a creditor upon a judgment earlier in date where the writ was subsequently placed in the hands of the sheriff (*Guest v. Corbridge Railway*, 1868, L. R. 6 Eq. 619). Where lands have been taken in execution under one *elegit*, they cannot be taken under another *elegit* (*Carter v. Hughes*, 1858, 2 H. & N. 714).

Writ, how executed.—The sheriff, on receipt of the writ, must impanel a jury to inquire as to the lands of the debtor and their value. He must file a return to the writ, which return is termed an inquisition (see Chitty's *Forms*, 12th ed., p. 428). The inquisition must fix the lands with reasonable certainty, though they need not now be set out by metes and bounds (*Doe d. Roberts v. Parry*, 1844, 13 Mee. & W. 356; and see S. C., *Ruling Cases*, vol. xi. p. 672; *Sherwood v. Clarke*, 1846, 15 Mee. & W. 764).

Return necessary.—It is necessary that there should be a return to the writ if any lands have been extended under it, for on the return the title of the judgment creditor depends. The return vests the land in him. "The sheriff does not give the creditor actual possession of the land itself, but the effect of his return is that it vests the legal estate in the creditor. The creditor can then bring ejectment, if it is an estate in possession, or he can sue for the rent if it is a reversion" (per Mellish, L.J., *Hutton v. Haywood*, 1874, L. R. 9 Ch. p. 236).

Position of Tenant by elegit.—The judgment creditor to whom delivery of his debtor's land in execution has been made is not put into actual but into merely legal possession. He acquires a special interest in the land, which is termed a tenancy by *elegit*. The land is delivered to him by the sheriff at a fixed annual rent; he holds it until the judgment debt has been satisfied out of the rents (*quousque debitum fuerit solutum*). The tenant by *elegit* can acquire actual possession by entry on the lands, or in certain cases by an action for recovery of the land. He can also obtain an order for sale under sec. 4 of the Judgments Act, 1864 (27 & 28 Vict. c. 112), or can obtain an order for appointment of a receiver (Chitty's *Arch.* p. 886; Anderson on *Execution*, pp. 399–405).

The interest acquired by a tenant by *elegit* is a chattel interest, which on his death will pass to his legal personal representatives.

Costs.—It seems that the execution creditor, so long as he retains possession under the writ, cannot obtain an order to tax his costs of an inquisition (*Mahon v. Miles*, 1881, 30 W. R. 123).

Effect of Bankruptcy of Debtor.—The provisions of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45 (1) (*supra*, p. 132), apply *mutatis mutandis* to a writ of *elegit*. By subsec. 2 it is provided that an execution against land is completed by seizure. Mere holding of the inquisition and delivery of possession without return to the writ is seizure within this provision (*In re Hobson*, 1886, 33 Ch. D. 493).

Protection of Purchasers.—For the protection of *bond fide* purchasers for value and mortgagees various statutes have been passed making registration of writs necessary. By the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), ss. 1, 2, no writ of execution will bind lands in the hands of purchasers or mortgagees, unless such writ is registered as there provided, and reregistered every five years.

By the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 1, no judgment to be entered up after 29th July 1864 binds the land until it shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment. Such writ requires registration, in accordance with the provisions of 23 & 24 Vict. c. 38. The Lands Charges, Registration, and Searches Act, 1888 (51 & 52 Vict. c. 51), ss. 5, 6, requires writs and orders affecting land to be registered and reregistered every five years at the Office of Land Registry. Unless the writ or order is so registered, every delivery in execution or other proceeding taken in pursuance thereof is void against a purchaser for value. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 19).

Rights of Execution Debtor.—As soon as the judgment is satisfied out of the value of the land, the execution debtor is entitled to have it back, and can recover possession either by ejectment or action of *scire facias ad rehabendam terram*. He may also apply for an account and redelivery on payment of what shall be found due. The tenant by *elegit* is liable to account on the footing of wilful default as in the case of an account taken against a mortgagee in possession (*Bell v. Faulkner*, 1847, 1 De G. & Sm. 685). The judgment debtor was always entitled to obtain an account from the tenant by *elegit* in equity (*Hale v. Thomas*, 1685, 1 Vern. 349); now by the express provisions of 1 & 2 Vict. c. 110, s. 11 (*supra*), the account can be obtained in the Court out of which the writ issued (*Daniell's Ch. Pr.* pp. 874, 875; *Chitty's Arch.* p. 887; *Edwards on Execution*, p. 185).

Effect of Charge created by elegit as against Devisee of Debtor.—Where a testator devised land to A., which under a judgment against the testator was delivered in execution under a writ of *elegit*, and the debt was unsatisfied at testator's death, it was held that the judgment debt was a charge in the land within Locke King's Acts (17 & 18 Vict. c. 113; 40 & 41 Vict. c. 34), and must be paid by the devisee in exoneration of the personal estate (*In re Anthony, Anthony v. Anthony*, [1892] 1 Ch. 450); but the charge was held not to be enforceable in exoneration of the personal estate against certain of the lands which were subsequently found to have belonged to the testator, not in fee-simple but as tenant in tail under a settlement (*In re Anthony, Anthony v. Anthony*, [1893] 3 Ch. 498).

The two writs we have* already considered (*fieri facias* and *elegit*) are those which are alone available to a judgment creditor to enforce judgments or orders for payment of money or costs to a person, at any rate where no time is fixed for payment by the debtor. Other writs of execution must be resorted to for the purpose of enforcing against

property judgments which are not within that category. We have now to consider the following writs:—(1) The Writ of Sequestration, (2) the Writ of Possession, (3) the Writ of Delivery.

THE WRIT OF SEQUESTRATION.

When available.—A writ of sequestration may, according to the practice of the Supreme Court, issue in the following cases, viz.:—

A. Without order (see *Sprunt v. Pugh*, 1878, 7 Ch. D. 567) after personal service (Order 41, r. 5) of any judgment or order for—

(a) Payment of money into Court, or requiring the defendant to do any other act in a limited time (Order 42, r. 4; Order 43, r. 6);

(b) For the recovery of any property other than land or money (Order 42, r. 6).

B. By order (not drawn up; Order 52, r. 14)—

(c) Against the property of a corporation which has wilfully disobeyed a judgment, or of its officers (Order 42, r. 31);

(d) In payment of costs (Order 43, r. 7).

By sec. 8 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), sequestration against the property of a debtor may be issued by any Court of equity in the same manner as if such debtor had been actually arrested. And by the Chancery General Orders, under the Act dated 7th January 1870, where any person is by a decree or order directed to pay money or costs in a limited time, and after due service of such decree or order refuses or neglects to make such payment, the person prosecuting the decree or order shall, at the expiration of the time limited, be entitled to a commission of sequestration, which may be issued without special order.

Although in *Ex parte Nelson, In re Hoare* (1880, 14 Ch. D. 41), a doubt was expressed whether or not sequestration could issue to enforce a simple judgment for recovery of money, the question is settled by *Hulbert v. Cathcart*, [1894] 1 Q. B. 244, where it was held, not only that sequestration could not issue on a simple judgment of the Queen's Bench Division for recovery of money, but that there was no jurisdiction to make a subsequent order under such judgment fixing a time for payment so as to bring it within the rule as to the issue of sequestration. In *Willcock v. Terrell* (1878, 3 Ex. D. 323) the time for payment was limited, and such limitation brought the case within Order 43, r. 6.

In the following cases writs of sequestration were issued on judgments for payment of money recovered in matrimonial causes: *In re Slade, Slade v. Hulme*, 1881, 18 Ch. D. 653; *Birch v. Birch*, 1883, 8 P. D. 163. It seems clear that where a judgment for payment of money to a person limits a time within which the payment must be made, the case falls within Order 43, r. 6, and a sequestration may issue (see Anderson on *Execution*, pp. 539, 540, and *Willcock v. Terrell*, *supra*). As to sequestration for costs under Order 43, r. 7, see *Snow v. Bolton*, 1881, 17 Ch. D. 433; *Hulbert v. Cathcart*, [1896] App. Cas. 470. As to sequestration against a corporation, see *Spokes v. Banbury Board of Health*, 1865, L. R. 1 Eq. 42.

Original Effect of Writ preserved.—A writ of sequestration has the same effect as a writ of sequestration in Chancery had before the commencement of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery (Order 43, r. 6).

Origin of the Writ.—The writ of sequestration was originally a process

of contempt *in rem*, not *in personam* (*Tatham v. Parker*, 1853, 1 Sm. & G. 506; and see *Pratt v. Inman*, 1889, 43 Ch. D. p. 179), and was used where the defendant either could not be arrested, or, having been arrested, remained in prison without paying obedience to the Court. "Subsequently this process was merely used as a means of coercing the defendant, and of keeping him out of possession of his property; and the practice of applying the money received by the sequestrators in satisfaction of the sum decreed to be paid, is of comparatively modern origin. This, however, became the usual course of proceeding, and the Court of Chancery would, where a sequestration had been issued to enforce a decree for payment of money, order the sequestrators to apply what they had received by virtue of the sequestration, in satisfaction of the duty to be performed" (Daniell's *Ch. Pr.* p. 909). The writ met with small favour in the Courts of law. In the quaint language of an old writer: "It appears that there were great struggles between the common law Courts and Courts of equity before the process came to be established. The former held that a Court of conscience could only give remedy *in personam*, but not *in rem*; that sequestrators were trespassers, against whom an action lay, and in the case of *Colston v. Gardner*, 1680, 2 Ch. Cas. p. 45, the chancellor cites a case, where they ruled that if a man killed a sequestrator in the execution of such process, it was no murder.

"But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires that the decrees of this Court, which preserve men from deceit, should not be rendered illusory, that they could not long stand; but this process got the better of these resolutions on these grounds—first, that the extraordinary jurisdiction might punish contempts by the loss of estate as well as imprisonment of the person, because that liberty being a greater benefit than property, if they had a power to commit a person, they might take from him his estate, till he had answered his contempts; secondly, to say that a Court should have power to decree about things, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the Court itself" (Bac. *Abr.* tit. "Sequestration" (A)). It is stated by the author from whom we have just quoted that sequestrations were first introduced in Lord Bacon's time, and then but sparingly used (*ibid.*; see further, as to the history of the writ, Anderson on *Execution*, pp. 512–514).

Issue and Form of Writ.—A writ of sequestration is within Order 42, r. 8 (*supra*, p. 127), and therefore the rules of that order with regard to the issuing of a writ apply. Before the writ will be issued under Order 42, rr. 4, 6, or Order 43, r. 6, the judgment or order must be personally served on the defendant with the indorsement required by Order 41, r. 5. Service has been dispensed with where the party in default was shown to be evading service (*Hyde v. Hyde*, 1888, 13 P. D. 166; *Allen v. Allen*, 1885, 10 P. D. 187). In cases within Order 42, r. 31, where a prohibitive order is made against a corporation, such service is, it seems, not necessary (*Selous v. Croydon Local Board*, 1885, 53 L. T. 209).

The sequestration (see Form R. S. C. App. F, No. 10; Daniell's *Ch. Forms*, p. 406; Chitty's *Forms*, p. 448) is directed to not less than four sequestrators, who should be substantial persons and able to answer for their receipts. It is a common practice to make a sheriff's officer one of the sequestrators. The writ directs them to enter upon the real estate of the contemnor, and to collect, receive, and sequester the rents and profits thereof, and also his goods, chattels, and personal estate, and keep the same under sequestration until the contemnor perform the act required by the judgment

and clear his contempt. The property need only be described generally (*Hyde v. Hyde*, 1888, 13 P. D. 166).

An order giving leave for sequestration to issue conditional on a future default is irregular in point of form (*In re Lumley, Ex parte Cathcart*, [1894] 2 Ch. 271).

Property liable to Sequestration.—On this point the decisions are very numerous, and the reader is referred to the following authorities, where the cases will be found collected:—Daniell's *Ch. Pr.* pp. 914–916; Seton, pp. 395, 396; Anderson on *Execution*, pp. 520–532; Edwards on *Execution*, pp. 283–289; (Hitty's *Arch.* pp. 909–911).

Generally, the rents and profits of the contemnor's real estate can be taken; and all goods and chattels in his possession or which can be reached without suit must be seized by the sequestrators. As to choses in action, neither the writ nor notice to parties indebted to the contemnor gives the sequestrators a lien (*Ex parte Nelson, In re Hoare*, 1880, 14 Ch. D. 41), and an order for payment must be obtained (see *Wilson v. Metcalfe*, 1839, 1 Beav. 263; *Crispin v. Cumano*, 1869, L. R. 1 P. & D. 622; *Miller v. Huddleston*, 1882, 22 Ch. D. 233). Where the title is disputed, proceedings will have to be taken (*Wilson v. Metcalfe, ubi supra*; *Johnson v. Chippendale*, 1827, 2 Sim. 55). "There appears to be no case in which an order has been made to enforce a sequestration against third persons, who dispute their liability to the debtor, on motion in a suit to which they were not parties" (per Gorell Barnes, J., *Craig v. Craig*, [1896] Prob. p. 174).

Property of Married Women.—In divorce proceedings the writ need not be limited to the separate estate of a married woman (*Hyde v. Hyde*, 1888, 13 P. D. 166). Accrued dividends on a fund in Court, to the income of which a married woman is entitled with a restraint on anticipation, can be seized (*Claydon v. Finch*, 1873, L. R. 15 Eq. 266; and see *Bryant v. Ball*, 1878, 10 Ch. D. 153); but not future dividends (*Hyde v. Hyde, ubi supra*; *In re Lumley, Ex parte Hood-Barrs*, [1894] 3 Ch. 135). The onus is not on the creditor, but on the married woman, to show that there is no property which could be made available (*Hulbert v. Cathcart*, [1896] App. Cas. 470).

Execution of Writ.—The sequestrators should enter on the lands of the contemnor and obtain possession of his personal estate. They should require the tenants to attorn. In the event of the tenants not complying with the notice requiring them to attorn, an order for the purpose can be obtained. The sequestrators cannot obtain an order to sell the land (*Shaw v. Wright*, 1795, 3 Ves. 22), though *secus* as to personal estate (Daniell's *Ch. Pr.* pp. 916, 917). Interference with the possession of sequestrators is a contempt (*Angel v. Smith*, 1804, 9 Ves. 335; 7 R. R. 214).

Examination pro interesse suo.—Where claims are made by third parties to any property seized under the writ, an order for inquiry as to their interest may be asked for either by themselves or by the plaintiff, on which an examination *pro interesse suo* will be directed, which will be held before the Master in chambers (*Angel v. Smith*, 1802, 9 Ves. 336; 7 R. R. 214; Daniell's *Ch. Pr.* pp. 921, 922; Seton, pp. 400–403).

Sequestrators liable to Account.—"Sequestrators are officers of the Court, and as such are amenable to the Court, and are to act from time to time in the execution of their office as the Court shall direct. They are to account for what comes to their hands, and are to bring the money into Court as the Court shall direct, to be put out at interest or otherwise, as shall be found necessary. But this money is not usually paid to the plaintiff, but is to remain in Court till the defendant hath cleared his contempt, and then

whatsoever hath been seized shall be accounted for and paid over to him. However, the Court have the whole under their power, and may do therein as they please, and as shall be most agreeable to the justice and equity of the case" (Bac. Abr. tit. "Sequestration" (C)).

Effect of Writ.—The writ binds as from the time of awarding it, and not from the time of executing it (*Burdett v. Rockley*, 1682, 8 Vern. 57). It is good against a fraudulent conveyance (*Colston v. Gardner*, 1680, 3 Swan. 279 n), and against a mortgagee claiming under a mortgage made to avoid the sequestration, and with full notice of it (*Ward v. Booth*, 1872, L. R. 14 Eq. 195); but not as against the trustee in the defendant's bankruptcy. Mere issuing and service of the writ does not make the plaintiff a secured creditor within Bankruptcy Act, 1883 (*Ex parte Nelson, In re Hoare*, 1880, 14 Ch. D. 41). As to what is required for that purpose, see *ibid.* pp. 47, 48.

After entry into possession under the writ neither the execution creditor nor the sequestrators can obtain an order for sale under 27 & 28 Vict. c. 112 (*Johnson v. Burgess*, 1873, L. R. 15 Eq. 398; but see *In re Rush*, 1870, L. R. 10 Eq. 442).

In order to affect *bond fide* purchasers the writ must be registered under the Lands Charges, Registration, and Searches Act, 1888 (51 & 52 Vict. c. 51).

Death of Contemnor.—Proceedings may be continued against the representatives of the contemnor (*Hyde v. Greenhill*, 1746, 1 Dick. 106; *Pratt v. Inman*, 1889, 43 Ch. D. 175).

Discharge of Sequestration.—When the objects of the sequestration have been satisfied, an order may be obtained for the sequestrators to pass their accounts, and, after payment of all proper costs, charges, and expenses, to pay the balance to the party against whom the sequestration issued. For form of order, see Seton, p. 403.

THE WRIT OF POSSESSION.

Generally.—The writ of possession in the simple form prescribed by the Rules of the Supreme Court (Appendix H, No. 8) has taken the place of the writ of *habere facias possessionem*, formerly issued by the Common Law Courts to enforce a judgment in ejectment (Tidd's *Forms*, 685), and also of the writ of assistance issued by the Court of Chancery (Cons. Order 29, r. 5) to enforce a decree or order directing a person to deliver up possession of an estate to the plaintiff or a purchaser (Sidney Smith's *Pr.*, 7th ed., p. 208). The Court has still jurisdiction to order a writ of assistance to issue to put a person in possession of chattels (see WRIT OF DELIVERY, *infra*).

The adaptation of this writ to actions for recovery of land (as the action in ejectment is now called), as well as to orders of the Chancery Division for delivery of possession of land, is effected by the following rules:—

Order 42, r. 5. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

Order 47, r. 1. A judgment or order that a party do recover possession of any land may be enforced by writ of possession in manner before the commencement of the principal Act (Judicature Act, 1873) used in actions of ejectment in the superior Courts of Common Law.

Order 47, r. 2. Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing

an affidavit showing due service of such judgment or order, and that the same has not been obeyed.

When available.—In actions for recovery of land the writ of possession issues only on a final judgment for recovery of the land. It is a common practice where there are several defendants to enter several judgments for recovery of the land against the defendants separately. But the writ of possession cannot be issued on any such judgment, for it is in the nature of an interlocutory judgment only, and merely establishes the plaintiff's right over the land as against the particular defendant named. When the last of all the defendants sued is made liable to judgment, the final judgment becomes for the first time possible. It is directed against the land itself without reference to any individual: "adjudged that the plaintiff recover possession of the land" (*here follows the description of the property*). Upon a judgment so framed a writ of possession issues as of course, without order or service, or demand, as provided by Order 47, r. 1 (*supra*).

The procedure under Order 47, r. 2 (*supra*), is different. The rule deals with the enforcement of a judgment or order directing a person to do an act, and provides that, where the act to be done is the delivery up of land to some other person, the judgment may, on proof of due service and non-compliance, be enforced by writ of possession. Judgments and orders falling within this rule fall also within Order 41, r. 5. They must "state the time, or time after service . . . within which the act is to be done"; they must be served personally within that time (*Duffield v. Elwes*, 1840, 2 Beav. 268); and they must be indorsed with the notice to the person served, prescribed by the same rule. They must also describe the property with sufficient clearness to allow of its being defined in the writ of possession (*Thynne v. Sarl*, [1891] 2 Ch. 79). If these requirements are met, the writ of possession may issue, but not otherwise.

Judgment for Recovery of Land.—A judgment for foreclosure absolute is not a judgment for recovery of possession of land (*Wood v. Wheeler*, 1882, 22 Ch. D. 281; and see *Tawell v. Slate Co.*, 1876, 3 Ch. D. 629; *Gledhill v. Hunter*, 1880, 14 Ch. D. 492). *Seem* it is desirable in every foreclosure action to add a claim for possession (*Wood v. Wheeler* (*ubi supra*)).

Issue of Writ (see (n.) "*When available*," *supra*).—Where a landlord has recovered judgment in an action against his tenant for the possession of premises which have been held over after the expiration of the tenancy, he will be allowed to issue a writ of possession, notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjustifiable to issue such writ. It is for the defendant to show affirmatively that this will be the result (*Knight v. Clarke*, 1885, 15 Q. B. D. 294).

Execution of Writ.—The sheriff may break open the outer door for the purpose of executing the writ, for, by the second resolution in *Semayne's* case, 1604, 5 Co. Rep. 91 b; S. C., 1 Smith's *Leading Cases* (10th ed.), p. 99; *Ruling Cases*, vol. xi. p. 628, "Where any house is recovered by any real action, or *ejectione firmæ*, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are *habere seisinam* or *possessionem*, etc., and after judgment it is not the house in right and judgment of law of the tenant or defendant." If necessary, the sheriff may raise the *posse comitatus* (see *Sheriffs Act*, 1887, 50 & 51 Vict. c. 55, s. 8 (2)). Complete possession cannot be given without removing all persons and goods on the premises (*Upton v. Wells*, 1581, 1 Leon. 145). As to the way in which possession is

delivered, see Chitty's *Arch.* pp. 1227, 1228; Anderson on *Execution*, p. 416; Edwards on *Execution*, p. 103; Mather's *Sheriff Law*, p. 129; *Floyd v. Bethill*, 1607, 1 Roll. Rep. 420.

The writ should be executed within a reasonable time (*Mason v. Paynter*, 1841, 1 Q. B. 974). Execution is not completed until the bailiff have delivered possession and is gone (*Kingsdale v. Mann*, 1702, 6 Mod. 27).

Interference with the sheriff can be punished as a contempt, and so, if, after possession is delivered to the plaintiff, he be dispossessed by the defendant (Anderson, p. 417; Edwards, p. 104).

Second Writ.—If the writ has not been completely executed, a second writ may be sued out. After complete execution of the writ the plaintiff cannot have a fresh writ (Chitty's *Arch.* p. 1228).

Restitution.—If more land be delivered than was recovered, the plaintiff may be ordered to restore the excess, or a writ of restitution may be obtained. Where the judgment is reversed, a writ of restitution may also be awarded to the defendant (Daniell's *Ch. Pr.* p. 951; Chitty's *Arch.* p. 1229; Anderson on *Execution*, p. 421; Edwards on *Execution*, p. 106).

As to writ of possession generally, see Edwards on *Execution*, pp. 94–100; Anderson on *Execution*, pp. 412–414; Seton, p. 380; Chitty's *Arch.* p. 1227.

THE WRIT OF DELIVERY.

Generally.—There are two forms of the writ of delivery, one to recover specific chattels, and, if they are not found, to distrain all the defendant's lands and chattels until he renders the specific chattels to the plaintiff; the other to recover the specific chattels, and, if they are not found, to levy their assessed value on the defendant's goods and chattels. In both cases the writ may further direct the sheriff to levy damages and costs if the same are recovered by the judgment (R. S. C. App. H, Nos. 10 and 11).

When available.—Order 42, r. 6, provides that a judgment for recovery of any property other than land or money may be enforced by writ of delivery. The judgment in an action of *detinue* follows the old form in use in the Courts of Common Law prior to the Judicature Acts: "Adjudged that the plaintiff have a return of the chattel (*naming it*) or its value to be assessed, and that the plaintiff recover against the defendant [damages for the detention thereof to be also assessed, and] costs to be taxed." Upon such a judgment the plaintiff must first proceed by writ of inquiry or otherwise (Order 36, r. 57) to assess the value of the chattel, and damages, if any. After assessment the plaintiff must apply under Order 48, r. 1, for leave to issue a writ of delivery. That rule is in the following terms:—"Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of delivery, the Court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed, if any; and that if the property cannot be found, and unless the Court or a judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick, till the defendant deliver the property; or at the option of the plaintiff that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property." The writ of delivery, therefore, of whichever kind, can only be issued in pursuance of an order. Such order cannot be made until after assessment of the value of the chattel (*Clutton v. Carrington*, 1855, 15 C. B. 730; *Corbett v. Levin*, 1884, W. N. 62) unless the parties agree as to the amount (*Winfield v. Boothroyd*, 1886, 34 W. R. 501).

If in lieu of judgment in *detinue* in the form given above, the judgment or order of the Court is for the delivery up by a person to a person within a limited time of a specific chattel, such judgment or order would be within Order 43, r. 6, and on proof of personal service and non-compliance a writ of sequestration would issue without order (see SEQUESTRATION, *supra*).

Writ of Assistance.—For the purpose of recovering land the writ of assistance has, as we have seen (see WRIT OF POSSESSION, *supra*), been superseded by the writ of possession, but for the purpose of recovering possession of and preserving chattels a writ of assistance may still be issued in cases to which the writ of delivery does not apply, or in which it would be unavailing (*Wyman v. Knight*, 1888, 39 Ch. D. 165, following *Cazet de la Borde v. Othon*, 1874, 23 W. R. 110).

Origin of the Writ.—In equity the return of specific chattels having a peculiar value, as in the case of heirlooms and the like, was from very early times decreed by the Courts (*Pusey v. Pusey*, 1684, 1 Vern. 272; S. C., Wh. & T. L. C., 7th ed., p. 454; *Somerset (Duke of) v. Cookson*, 1735, 3 P. Wms. 389; S. C., Wh. & T. L. C., 7th ed., p. 455; *Fells v. Read*, 1796, 3 Ves. 71; 3 R. R. 47; and other cases collected, Seton, p. 1835). At law, on the other hand, in an action of *detinue* the defendant had the option of retaining the goods on payment of their value.

Sec. 78 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), now repealed (Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49)), which was in terms nearly identical with those of Order 48, r. 1, above quoted, extended the powers of the Courts of Common Law. The effect of the section has been thus stated: "The Courts of Common Law have now under this section, after judgment in an action of *detinue*, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter Court may enforce its decrees by attachment, while the Courts of Common Law can only enforce restitution under this section by *distringas*" (*Day's Common Law Procedure Acts*, 4th ed., p. 324).

The jurisdiction of the Court was extended to the case of actions for breach of contracts for sale of specific chattels by sec. 2 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). That section was repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and its place is taken by sec. 52 of last-named Act, which provides that in any action for breach of contract to deliver specific or ascertained goods, the Court may, on the application of the plaintiff, by its judgment or decree, direct that the contract be performed specifically without giving the defendant the option of retaining the goods in payment of damages. The provisions of Order 48, r. 1, would apply to a judgment under this section which would be enforceable by writ of delivery, or, if its terms brought it within Order 43, r. 6, by writ of sequestration.

Separate Writs for Damages, Costs, and Interest.—The plaintiff may either by the writ of delivery or by a separate writ of execution have made of the defendant's goods the damages and costs awarded, and interest (Order 48, r. 2).

Property in Goods.—The property in goods recovered in the action remains in the plaintiff until the sheriff has levied their value (*In re South*, 1874, L. R. 10 Ch. 234).

[See further as to writ of delivery, Daniell, *Ch. Pr.* pp. 952-954; Chitty, *Arch.* pp. 904-906; Anderson on *Execution*, pp. 423-427; Edwards on *Execution*, pp. 195-198; Mather, *Sheriff Law*, pp. 132-134.]

2. *By Order.*

We have seen that the writ, besides being the most ancient method of executing a judgment against property, is also that which is most ordinarily adopted, on account probably of its simplicity and directness. The remedy thus provided is usually sufficient for the purpose. In some instances, indeed, there is no alternative, and no other supplementary mode of execution against the property of the defendant. But if, on a judgment for recovery or payment of money, the judgment creditor were in all cases compelled to rely solely on his remedy by writ he would not infrequently find himself unable to reap the full fruits of his judgment. Several forms of personal property cannot be reached by a *fi. fa.*; some interests in land are not extendible under an *elegit*, and the tenant by *elegit* has no power by mere virtue of the writ to sell the debtor's interest in the land. The Court, however, by express statutory enactment, or by rule, or well-established practice, possesses powers enabling it in certain cases to give a judgment creditor by order that satisfaction which he cannot obtain by writ. In all such cases an order of the Court, founded on and supplementary to the judgment, is necessary. The several methods of execution of this description we have for convenience classed under the general head of "Execution by Order." The difference between them and execution by writ may be summarised thus: Execution by writ is dependent solely on the judgment; execution by order results from the combined effect of the judgment and subsequent ancillary process. In this connection we shall have to pass in review the following modes of execution:—(1) Attachment of debts; (2) Charging order on stocks and shares, etc.; (3) Sale of the debtor's interest in land; and finally we shall have to direct attention to that system which plays so important a part in modern practice and is termed Equitable Execution.

ATTACHMENT OF DEBTS.

Origin and History of Jurisdiction.—This method of execution, by which a judgment creditor is enabled to make debts due to his judgment debtor available towards satisfaction of the judgment debt, is of comparatively modern origin. No such power existed prior to the year 1854. The system was recommended by the Common Law Commissioners (see their Second Report, 30th April 1853, p. 38), and accordingly the practice was introduced by the garnishee sections of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 60-67). In compliance with the further recommendations of the Commissioners (Third Report, 1860, p. 7) the procedure was further developed by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, ss. 28-31). The sections of the two statutes above referred to which deal with the subject were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49). Their provisions, however, are in effect reproduced by the Rules of the Supreme Court, 1883 (Order 42, rr. 32, 34, and Order 45). The remedy is now available to a judgment creditor on a judgment or order for the recovery or payment of money in any Division of the High Court (*In re Cowans' Estate*, 1880, 14 Ch. D. 638); formerly it was confined to judgments obtained in one of the Superior Courts of Common Law (*Financial Corporation v. Price*, 1869, L. R. 4 C. P. 155; *Horsley v. Coar*, 1869, L. R. 4 Ch. 92). See Cababé on *Attachment of Debts*, pp. 1-4; Day's *Common Law Procedure Acts*, pp. 24, 370.

Discovery of Debts.—It frequently happens that the judgment creditor

is **unaware** of the debts owing to the judgment debtor. By the Common Law Procedure Act, 1854, s. 60, power was given to examine the debtor on the **subject**, and a similar provision was contained in the original rules under the Judicature Acts (R. S. C. 1873, Order 45, r. 1). A like power still exists, and is available to a judgment creditor under R. S. C. 1883, Order 42, r. 32. Inasmuch, however, as the power of obtaining discovery from the judgment debtor in aid of execution has been extended to matters other than debts, with which alone we are now concerned, it has been thought better to leave the consideration of the question for a subsequent section of this article (see *infra*, D.).

Order for Attachment of Debts.—The power to attach or garnish a debt is conferred by Order 45, r. 1, which in effect reproduces sec. 61 of the Common Law Procedure Act, 1854. The rule is in the following terms:—

"The Court or a judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order."

Rule 2 is in the following terms:—

"Service of an order that debts, due or accruing to the debtor, liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands."

Careful consideration of the two rules above quoted suggests the following questions, to each of which answers are to be found in the reported cases:—

(1) Who is entitled to institute garnishee proceedings? In other words, who are comprehended in the terms "any person who has obtained a judgment or order for the recovery or payment of money"?

(2) What is a judgment or order for the recovery or payment of money?

(3) What is meant by the term "all debts owing or accruing"? In other words, what is an attachable debt?

(4) What is the effect of "binding the debts"?

(1) *Who is entitled to institute Garnishee Proceedings?*—By virtue of sec. 25 (6) of the Judicature Act, 1873, an assignee of the judgment debt is a "person who has obtained a judgment" within the terms of the rule, and can therefore apply for a garnishee order (*Goodman v. Robinson*, 1886, 18 Q. B. D. 332). The legal personal representative of the judgment creditor on reviving the judgment is entitled to attach a debt due to the judgment debtor (*Banyard v. Simmons*, 1855, 5 El. & Bl. 59).

(2) *What is a Judgment or Order for the Recovery or Payment of Money?*—Under sec. 61 of the Common Law Procedure Act, 1854, and Order 45, r. 2, of the Rules of 1875, the power to attach debts owing to the judgment debtor was held to be limited to the case of a person entitled under a judgment, mere orders not being within the section or rule (see, e.g., *In re Frankland*, 1872, L. R. 8 Q. B. 18; *Best v. Pembroke*, 1873, L. R. 8 Q. B. 363; *Cremetti v.*

Crom, 1879, 4 Q. B. D. 225); the present rule expressly extends the remedy to the case of orders. The judgment or order, however, must be one strictly for "recovery or payment of money." Thus an order for payment into Court is not one which can be enforced by garnishee proceedings (*In re Greer, Napper v. Fanshawe*, [1895] 2 Ch. 217).

Judgment against a married woman, execution upon which is limited to her separate estate, is a judgment on which garnishee proceedings can be founded (*Holtby v. Hodgson*, 1889, 24 Q. B. D. 103).

(3) *What Debts are attachable?*—Equitable as well as legal debts can now be attached (*In re Cowans' Estate, Rapier v. Wright*, 1880, 14 Ch. D. 638, per Hall, V.C.; *Webb v. Stenton*, 1883, 11 Q. B. D. 518, per Lindley and Fry, L.J.J., pp. 526, 529).

Only that can be attached which the judgment debtor could honestly and properly deal with without violation of the rights of other persons (*In re General Horticultural Co., Ex parte Whitehouse*, 1886, 32 Ch. D. 512; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 238, at p. 257; *Hancock v. Smith*, 1889, 41 Ch. D. 456; *Davis v. Freethy*, 1890, 24 Q. B. D. 519).

The ruling principle which runs through and governs the numerous decisions on the meaning and effect of the words "debts owing or accruing" may be stated as follows:—To constitute an attachable debt there must be an actual debt due from the garnishee to the judgment debtor, a debt that is either presently payable, or presently due, though payable at a future day. "I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in præsentì, solvendum in futuro*." "The result seems to me to be this: you may attach all debts, whether equitable or legal; but only debts can be attached" (per Lindley, L.J., *Webb v. Stenton*, *ubi supra*, pp. 527, 528; see S. C., and notes thereto, *Ruling Cases*, vol. xi. pp. 685 *et seq.*).

"*Debts Accruing*."—The words "debts accruing" refer to debts of the latter class, *debita in præsentì, solvenda in futuro* (*Jones v. Thompson*, 1858, El. B. & E. 63, per Wightman and Crompton, J.J.; and see S. C., and notes, *Ruling Cases*, vol. xi. pp. 682 *et seq.*; *Tapp v. Jones*, 1875, L. R. 10 Q. B. 591, per Blackburn, J.).

The two cases last cited were referred to with approval in the judgments in *Webb v. Stenton*, *ubi supra*; and Brett, M. R., says, "Therefore it seems to me that the meaning of 'accruing debt' in Order 45 is *debitum in præsentì, solvendum in futuro*" (p. 524).

It follows that something which may or may not become a debt is not attachable (*Richardson v. Elmit*, 1876, 2 C. P. D. 9; *Hall v. Pritchett*, 1877, 3 Q. B. D. 215); nor a debt dependent upon an unfulfilled condition (*Howell v. Metropolitan Ry. Co.*, 1881, 19 Ch. D. 508).

Moneys in custodia legis.—Money paid into Court cannot be attached (*Stevens v. Philips*, 1875, L. R. 10 Ch. 417); nor money paid into a County Court (*Dolphin v. Layton*, 1879, 4 C. P. D. 130); nor dividends in bankruptcy payable by the official receiver (*Prout v. Gregory*, 1889, 24 Q. B. D. 281). The principle in these cases seems to be that the money is in the hands of the Court or its officer, and there is no debt on which the judgment debtor could sue.

Moneys in hands of Sheriff.—Money in hands of a sheriff may be attached (*Murray v. Simpson*, 1858, 8 Ir. R. C. L. App. XLV.; and see *In re Greer, Napper v. Fanshawe*, [1895] 2 Ch. 217). The effect of subsec. 2 of sec. 11 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), is to place a temporary

stay on money in the hands of the sheriff. The right of the execution creditor is not a contingent right; it is a vested right liable to be divested in the event of bankruptcy intervening within fourteen days (*In re Greer, ubi supra*).

Joint Debts.—A debt due to the judgment debtor jointly with another cannot be attached (*Macdonald v. Tucquah Gold Mine Co.*, 1884, 13 Q. B. D. 535). "For a case where the damages recovered in an action by the judgment debtor and wife were held to be severable and only the amount awarded to the husband liable to attachment, see *Beasley v. Roney*, [1891] 1 Q. B. 509.

Effect of Direction at Trial that Judgment be entered.—A debt owing and accruing within the rule is constituted as soon as the judge at the trial orders judgment to be entered for a certain amount (*Holtby v. Hodgson*, 1889, 24 Q. B. D. 103). This case (which was decided upon the difference between modern and ancient practice) appears to render the decision in *Jones v. Thompson, ubi supra*, that a verdict in which judgment had not been signed was not an attachable debt, no longer applicable.

Income of Funds payable to a Married Woman restrained from anticipation.—Income of trust funds belonging to a married woman which she is restrained from anticipating cannot be attached (*Chapman v. Biggs*, 1883, 11 Q. B. D. 27; and see *Galmoye v. Cowan*, 1889, 58 L. J. Ch. 769). But, *semble*, arrears of income due at the date of the order *nisi* could be attached on the principle of *Hood-Barrs v. Heriot*, [1896] App. Cas. 174.

Debts owing from a Firm.—Debts owing from a firm carrying on business within the jurisdiction may be attached, although one or more members of the firm may be resident abroad, provided that the garnishee order be served on any person having the control or management of the partnership business, or on any member of the firm within the jurisdiction (Order 48 a, r. 9).

Statutory Exemptions.—Certain debts are protected from attachment by statute. Thus, by the Wages Attachment Abolition Act, 1870 (33 & 34 Vict. c. 30), the wages of servants, labourers, and workmen are exempt. As to this Act, see *Gordon v. Jennings*, 1882, 9 Q. B. D. 45; *Booth v. Trail*, 1883, 12 Q. B. D. 8. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 163), the wages of seamen are protected from attachment.

A pension under the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), pensions payable to any officer or soldier (Army Act, 1881 (44 & 45 Vict. c. 58, s. 141)), naval pensions (28 & 29 Vict. c. 73, s. 4), Indian pensions (Pension Act, 1871, No. xxiii. (Indian), ss. 11, 12), are not assignable, and therefore not attachable. As to pensions generally, see *Apthorpe v. Apthorpe*, 1887, 12 P. D. 192; *Lucas v. Harris*, 1886, 18 Q. B. D. 127. The latter was a case of equitable execution by appointment of a receiver, but the principle applies. "Where the pension of a retired officer, whether naval, military, or civil, is not made inalienable by statute, it is alienable. . . . But if, by any particular statute, a retiring pension is inalienable, there is no authority to show that it can be taken in execution" (per Lindley, L.J. pp. 135, 136).

[The cases as to what debts are, and what are not, attachable, will be found collected and their effect well stated in Calabé on *Attachment of Debts*, pp. 26–38; and see Daniell's *Ch. Pr.* pp. 943–945; Seton, pp. 432, 433; Chitty's *Arch.* pp. 927–933; Anderson on *Execution*, pp. 452–459; Edwards on *Execution*, pp. 355–369.]

(4) *What is the effect of "Binding the Debt"?*—As to the effect of the order, see *Chatterton v. Watney*, 1881, 17 Ch. D. 259; *In re Combined Weighing and Advertising Machine Co.*, 1889, 43 Ch. D. 99.

No Transfer of the Debt.—The order does not transfer the debt; it creates no debt either in law or in equity, as between garnishor and garnishee. "It only takes away the right of the judgment debtor to receive the debt, and gives the judgment creditor a right to receive it" (see Cotton, L.J., *Chatterton v. Watney (ubi supra)*, p. 262). "It is plain to my mind that there is no transfer of the debt. It is equally plain to my mind that the garnishee order, therefore, does not make the garnishor a creditor of the garnishee. What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him, in the event of the money not being paid, to obtain execution. He has all these rights, but there is no transfer of the debt, and he is not created a creditor" (per Fry, L.J., *In re Combined Weighing and Advertising Machine Co. (ubi supra)*, pp. 105, 106).

There being no transfer of the debt, there is no debt attachable by a judgment creditor of the garnishor (*Cooper v. Lawson*, 1889, 6 T. L. R. 34).

Time from which Charge takes effect.—The charge created by the order is not so created until service of the order *nisi* on the garnishee (*In re Stanhope Silkstone Collieries Co.*, 1879, 11 Ch. D. 160; *Hamer v. Giles*, 1879, 11 Ch. D. 942).

Priority of Charges created before Service of Order.—We have seen that nothing can be attached which the judgment debtor cannot himself honestly deal with (*supra*, p. 148, and cases there cited). It follows that a charge created prior to the service of the order has priority over it. Want of notice is immaterial (*In re General Horticultural Co., Ex parte Whitehouse*, 1886, 32 Ch. D. 512; *Badeley v. Consolidated Bank*, 1888, 38 Ch. D. 536).

Bankruptcy of Judgment Debtor.—Many of the cases with regard to the meaning of the words "binding the debts" turn upon their effect under former bankruptcy Acts, in case of the bankruptcy of the judgment debtor pending garnishee proceedings. These cases (see Calabé, pp. 42-45) have now no more than a historical interest. By the present rule in bankruptcy, where a creditor has attached any debt due to a debtor, he will not be allowed to retain the benefit of the attachment against the trustee in bankruptcy of the debtor unless he has completed the attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. An attachment of a debt is completed by receipt of the debt (Bankruptcy Act, 1883 (46 & 47 Vict. c. 72, s. 45 (1) (2)).

"Receipt of the debt" means actual receipt (*Butler v. Wearing*, 1885, 17 Q. B. D. 182; *In re Trehearne*, 1890, 63 L. T. 323).

It is not intended to discuss at any length the details of garnishee procedure, full particulars of which will be found in *The Annual Practice*, 1898, and other works; and see ATTACHMENT OF DEBTS. The following is the briefest possible summary of the steps subsequent to service of the order *nisi*:—

The garnishee can either admit or dispute the debt.

Admission of Liability by Garnishee.—If he admits it, he should not, before order absolute, pay the debt to the judgment creditor (*Turner v. Jones*, 1857, 1 H. & N. 878); but should either pay the money into Court, or attend on the adjourned hearing, when an absolute order will be made. In such case, in the absence of notice of bankruptcy proceedings against the debtor, or of prior equities binding the debt, the garnishee can with

safety pay the judgment creditor. Payment under threat of execution to the judgment debtor has been held to operate as a discharge to the garnishee as against the judgment creditor (*Turnbull v. Robertson*, 1878, 47 L. J. C. P. 294). A voluntary payment, however, is not a discharge (*Mayor of London v. London Joint-Stock Bank*, 1881, 6 App. Cas. 393—a case of foreign attachment in the Lord Mayor's Court, on which ancient jurisdiction the garnishee process in the High Court is founded). Payment into Court or execution levied against the garnishee amounts to a discharge (Order 45, r. 7; see *Culverhouse v. Wickens*, 1868, L. R. 3 C. P. 295).

Dispute of Liability.—In the event of the garnishee neither paying the debt into Court nor appearing, on return of the summons, to dispute the debt, the Court may order execution to issue against him (r. 3).

A garnishee, who allows an order absolute to go against him by default, cannot be heard to say that there was no attachable debt, even though such defence would have been open to him if he had appeared to dispute liability (*Randall v. Lithgow*, 1884, 12 Q. B. D. 525).

Issue may be directed.—Should the garnishee dispute his liability, an issue may be directed to try such liability (r. 4).

Set-off.—In determining the liability of the garnishee questions of set-off as between himself and the judgment debtor can be disposed of, and the account between them taken, the judgment creditor standing in the shoes of the debtor. Where the question is one which would have needed a cross-action, it cannot be set up against the judgment creditor (*Stumore v. Campbell*, [1892] 1 Q. B. 314). Nor can the garnishee raise against the execution creditor a set-off claimed by the garnishee himself against the creditor (*Sampson v. Seaton and Beer Ry. Co.*, 1874, L. R. 10 Q. B. 28).

Claim of Third Persons.—Whenever it is suggested by the garnishee that the debt belongs to some third person, or that a third person has a lien or charge upon it, the Court may order such third person to appear and state the nature and particulars of his claim (r. 5). After hearing such third person, or on his failing to appear, the Court may order execution to issue to levy the amount due from the garnishee, or direct an issue to determine any question, and may bar the claim of the third person, or make such order as shall in the circumstances be just (r. 6).

Whenever there is a reasonable suggestion that the money sought to be attached is trust money, and the debtor is not himself entitled to it (even though the suggestion be not made by the garnishee), an order absolute ought not to be made, the proper course being for the money to be paid into Court to abide inquiry (*Roberts v. Death*, 1881, 8 Q. B. D. 319).

Garnishee Order absolute is not a Final Order.—A garnishee order absolute is not a final judgment within sec. 4 (1) (g) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), upon which a bankruptcy notice can be grounded (*Ex parte Chinery, In re Chinery*, 12 Q. B. D. 342). A judgment is not "final," and execution thereon is stayed, within the meaning of the section, so long as a garnishee order attaching the judgment debt is undischarged. Consequently a bankruptcy notice cannot issue on it (*In re Connan, Ex parte Hyde*, 1888, 20 Q. B. D. 690).

Petition to wind up a Company cannot be founded on it.—A judgment creditor who has attached a debt due from a company is not a creditor of the company within sec. 82 of the Companies Act, 1862 (25 & 26 Vict. c. 89), and cannot present a winding-up petition (*In re Combined Weighing and Advertising Machine Co.*, 1889, 43 Ch. D. 99).

Solicitor's Lien.—The lien of a solicitor for his costs of recovering or preserving the property has priority over a garnishee order (*Dallow v.*

Garrold, 1884, 13 Q. B. D. 543; and see *The Jeff Davis*, 1867, L. R. 2 Ad. & Ec. 1; *The Leader*, 1868, L. R. 2 Ad. & Ec. 314; *Birchall v. Pugin*, 1875, L. R. 10 C. P. 397; *Sympton v. Prothero*, 1857, 26 L. J. Ch. 671; *Eisdell v. Conyngham*, 1859, 28 L. J. Ex. 213). But the garnishee order is good as against the solicitor's general lien (*Hough v. Edwards*, 1856, 26 L. J. Ex. 54).

Setting aside Order.—In a case of mutual mistake a garnishee order absolute was set aside (*Moore v. Peachey*, 1892, 66 L. T. 198).

[As to attachment of debts generally, see Anderson on *Execution*, pp. 448–474; Cababé on *Attachment of Debts*; Chitty's *Arch.* pp. 927–940; Daniell's *Ch. Pr.* pp. 941–948; Edwards on *Execution*, pp. 349–374; Seton, pp. 430–435.]

CHARGING ORDER UPON STOCK OR SHARES.

The method of execution which has next to be considered has had a short and uneventful existence. Conferred by statute in 1838, enlarged by subsequent enactment two years later, and finally adopted by the Rules of the Supreme Court, the jurisdiction of the Court to-day is precisely the same, and is exercised in almost precisely the same manner, as was the case sixty years ago. When it is remembered how vast has been the increase of recent years in the particular class of property to which this mode of execution is applicable, owing to the development of joint-stock enterprise, it may well be a matter for surprise that a simpler and more direct process has not taken the place of a system which is at once dilatory and costly.

Origin of Jurisdiction.—Prior to the Judgments Act, 1838 (1 & 2 Vict. c. 110), a judgment creditor could not by the ordinary process of execution reach stocks or shares standing in the name of the judgment debtor in the books of the Bank of England, or of any public company (see per Kay, L.J., *In re Leavesley*, [1891] 2 Ch. pp. 7, 8). The remedy was supplied by secs. 14, 15 of the last-named Act, the provisions of which were by the Judgment Act, 1840 (3 & 4 Vict. c. 82, s. 1), extended to dividends and interest on stocks and shares, and to funds in Court and the dividends thereon in which the debtor was beneficially interested.

By Order 46, r. 1, of the Rules of Supreme Court it is provided as follows:—

An order charging stock or shares may be made by any Divisional Court, or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.

It will be seen, therefore, that the jurisdiction conferred on the Court rests entirely on statute. It is necessary for a due consideration of the subject to set out *in extenso* the statutory provisions referred to in the above rule.

Secs. 14 and 15 of the Judgments Act, 1838, are as follows:—

Sec. 14. And be it enacted, that if any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no

proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

Sec. 15. And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares, hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that, unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.

Sec. 1 of the Judgments Act, 1840, by which the remedy provided by the previous statute was extended to dividends and to funds in Court, was, as amended by subsequent repeals, in the following terms:—

The aforesaid provisions of the said Act (*i.e.* 1 & 2 Vict. c. 110, s. 4) shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent as well in any such stocks, funds, annuities, or shares as aforesaid as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities or shares as aforesaid, which now are, or shall hereafter be, standing in the name of the Accountant-General of the Court of Chancery, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

Effect of Statutory Provisions.—The result of these provisions is shortly this. A judgment creditor, upon a judgment for the recovery of money,

may obtain on *ex parte* application an order *nisi* charging with the payment of the judgment debt and interest stocks and shares standing in the name of the judgment debtor, or in the name of any person in trust for him, and the dividends thereon. The order *nisi* operates to prevent transfer of the stock or payment of the dividends, and makes subsequent dealings by the judgment debtor inoperative as against the judgment creditor. If no sufficient cause be shown by the debtor at the time mentioned in the order *nisi* the order will be made absolute. After the expiration of six months from the date of the order the judgment creditor may take the necessary steps to realise his charge.

Practice.—As to the practice, see *Annual Practice*, 1898, pp. 841–844; *Daniell's Ch. Pr.* pp. 934–941; *Chitty's Arch.* pp. 919–924; and see CHARGING ORDER.

It is necessary to consider—

- (1) In what cases the order is obtainable.
- (2) What interest can be charged.
- (3) What is the effect of the order.

(1) *In what cases the Order is obtainable.*—Under the old practice the Court of Chancery had no jurisdiction to make a charging order in respect of a judgment at law, though a stop order on a fund in Court could be granted in aid of a charging order obtained from a Court of law (*Miles v. Presland*, 1840, 4 Myl. & Cr. 431; *Hulkes v. Day*, 1840, 10 Sim. 41). In the case of decrees and orders in Chancery for payment of money, that Court had power to make the order (*Stanley v. Bond*, 1844, 7 Beav. 386). Under Order 46, r. 1, the order may be made by any judge of the High Court, and a preliminary charging order need not be obtained from the Court in which the judgment was awarded before application is made in the Chancery Division for a stop order (*Hopewell v. Barnes*, 1876, 1 Ch. D. 630).

Amount must be Liquidated.—A charging order can be obtained only where the amount is liquidated by the judgment (*Widgery v. Tepper*, 1877, 6 Ch. D. 364; *Chadwick v. Holt*, 1856, 8 De G., M. & G. 584; contra *Burns v. Irving*, 1876, 3 Ch. D. 291). So an order for payment into Court to the credit of a cause is not such an order as constitutes a judgment creditor within 1 & 2 Vict. c. 110 (*Ward v. Shakeshaft*, 1860, 1 Dea. & Sw. p. 272). But the order may be obtained forthwith where the judgment provides for payment on or before a future day (*Baynall v. Carlton*, 1877, 6 Ch. D. 130).

Interest of Lunatic.—An order can be made in favour of the judgment creditor of a lunatic (*Horne v. Pountain*, 1889, 23 Q. B. D. 264); the order in such case should be unconditional, and should not leave to the determination of the Lords Justices in Lunacy what part of the lunatic's fund should be charged (S. C.).

Where Debtor dead.—The order cannot be made absolute where it appears that the judgment debtor was dead at the date of the order *nisi*, for the section only allows the judge to make the order absolute after hearing what the judgment debtor has to say against it (per Cockburn, C.J., *Finney v. Hinde*, 1879, 4 Q. B. D. 102).

What may be Charged.—To constitute a chargeable interest it must be shown that the debtor has a beneficial interest in the fund, and one which he can validly and effectually charge (see judgments in *In re Leavesley*, [1891] 2 Ch. 1). Thus, if the debtor be but a trustee of the fund for others no charging order is obtainable (*In re Blakely Ordnance Co.*, 1870, 46 L. J. Ch. 367; *Gill v. Continental Union Gas Co.*, 1872, L. R. 17 Ex. 332). And it has been held that mere qualification shares standing in the name

of the debtor as nominee for other persons are not shares standing in his name in his own right, and cannot therefore be charged (*Cooper v. Griffin*, [1892] 1 Q. B. 740; *Howard v. Sadler*, [1893] 1 Q. B. 1).

Contingent Interests.—Contingent interests can be charged (*Baker v. Tynte*, 1860, 2 El. & El. 897; *Cragg v. Taylor*, 1867, L. R. 2 Ex. 131).

Trust Funds.—The fact that stock stands in the name of a trustee in trust for others as well as the debtor is no objection to an order charging the debtor's interest; it is none the less stock "standing in name of any person in trust for him" (*South-Western Loan and Discount Co. v. Robertson*, 1881, 8 Q. B. D. 17); but if the debtor's interest be an interest not in the fund itself, but in the estate of which it forms part, such interest is not chargeable (*Dixon v. Wrench*, 1869, L. R. 4 Ex. 154).

Interest of Married Women.—The interest of a married woman settled to her separate use with a restraint on anticipation cannot be charged (*Stanley v. Stanley*, 1878, 7 Ch. D. 589; *Smith v. Whitlock*, 1886, 34 W. R. 414).

Cash in Court.—Cash in Court not being dividends cannot be charged under the statutory jurisdiction, for the statutory provisions relate only to stocks and shares, and the dividends and interest thereon: but under the general jurisdiction, and by way of equitable execution, a charging order may, it seems, be made (*Brecheton v. Edwards*, 1888, 21 Q. B. D. 488).

Fund to Credit of a Lunatic.—A fund in Court standing to the credit of a lunatic may be charged in favour of a judgment creditor of the lunatic (*Horne v. Pountain*, 1889, 23 Q. B. D. 264; *In re Leavesley*, [1891] 2 Ch. 1).

Effect of Order.—A charging order when made absolute takes effect from the date of the order nisi (*Haly v. Barry*, 1868, L. R. 3 Ch. 452; *Brecheton v. Edwards*, 1888, 21 Q. B. D. 488).

The validity of the order depends, not upon the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment. The sections which confer the jurisdiction must be read as meaning that the judgment creditor is to have the same remedies, and the order of the judge the same effect, as if the judgment debtor had made a valid and effective charge in favour of the judgment creditor (*In re Leavesley*, [1891] 2 Ch. 1). A charging order founded on a judgment which was invalid is itself invalid (*In re Onslow's Trusts*, 1875, L. R. 20 Eq. 677).

As to the meaning of the words in sec. 14 of the earlier Act, "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor"; and of sec. 1 of the later statute, "no order of any judge shall have any greater effect than if such debtor had charged," see judgment of Erle, J., in *Watts v. Porter*, 1859, 3 El. & Bl. 743, referred to with approval by Kay, J., in *In re Leavesley*, *ubi sup.*, pp. 10, 11. It follows from the rule that the charging order confers no more than the judgment debtor could himself give, that it gives the judgment creditor no priority over a prior charge, even though the interest be equitable, and no notice have been given to the trustee (*Brearcliff v. Dorrington*, 1850, 4 De G. & Sm. 122; *In re Bell*, *Carter v. Stadden*, 1886, 34 W. R. 363; and see *Bowan v. Earl of Oxford*, 1856, 6 De G., M. & G. 507; *Scott v. Lord Hastings*, 1858, 4 Kay & J. 135).

Lunacy.—To the extent of a charging order obtained by the judgment creditor of a lunatic upon a fund in Court to the account of the lunatic, such fund does not belong to the estate of the lunatic after his death, but the charging order must thereout be first satisfied (*In re Leavesley*, [1891] 2 Ch. 1). But during the life of the lunatic a charging order does not deprive the Court of the power to dispose of the fund for the benefit of the lunatic

(*In re Plenderleith*, [1893] 3 Ch. 332), though the Court will not make an order as against the creditors for the maintenance of the wife of a lunatic (*In re Winkle*, [1894] 2 Ch. 519).

Bankruptcy.—A charging order *nisi* is not an execution against the goods of a debtor "within sec. 45 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*In re Hutchinson*, *Ex parte Hutchinson*, 1885, 16 Q. B. D. 515), nor is it a "transaction" protected by sec. 49 of the same Act (*In re O'Shea's Settlement*, *Courage v. O'Shea*, [1895] 1 Ch. 325).

Discharge of Charging Order.—The proviso at the end of sec. 15 of 1 & 2 Vict. c. 110 only applies to the order *nisi*, and application to discharge it must be made before the order is made absolute (*Jeffreyes v. Reynolds*, 1882, 52 L. J. Q. B. 55; *Drew v. Willis*, [1891] 1 Q. B. 450).

Proceedings to protect Security.—Proceedings to enforce the charge cannot be taken until after the expiration of six months from the date of the order. Meantime, however, the judgment creditor may take proceedings to protect his security by suit (*Bristed v. Wilkins*, 1843, 3 Had. 235), stop order (*Watts v. Jefferyes*, 1851, 20 L. J. Ch. 659), notice to the Paymaster (*Brereton v. Edwards*, 1888, 21 Q. B. D. 488), or by notice in lieu of *distringas* under Order 46, r. 3. (See *DISTRINGAS (NOTICE IN LIEU OF.)*)

Proceedings to enforce Charge.—The statute puts the execution creditor in the same position as a chargee under a charge created by the debtor. He must therefore, in order to enforce his charge, take such proceedings as such a chargee could have taken. The remedy is by foreclosure proceedings, without which an order for sale cannot be made. Such order can only be obtained in an independent action (*Leggott v. Western*, 1884, 12 Q. B. D. 287). And the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 24), has made no difference in this respect (S. C.). Inasmuch as by the same Act (s. 34 (3)) foreclosure proceedings are assigned to the Chancery Division, there is no power to commence proceedings to enforce a charging order in any other division of the High Court. Proceedings may be commenced by originating summonses under Order 55, r. 5 a.

Other Forms of Charging Order.—As to charging orders against a partner's interest in the partnership, see *infra*, EXECUTION AGAINST PARTNERS.

A charging order in lunacy under the Lunacy Act, 1890 (53 & 54 Vict. c. 5, s. 109), is not within Order 46, r. 1 (*In re Cathcart*, [1893] 1 Ch. 466).

[As to charging orders generally, see *Annual Practice*, 1898; Daniell's *Ch. Pr.* pp. 934-941; Seton, pp. 426-429; Chitty's *Arch.* pp. 919-924; Anderson on *Execution*, pp. 475-488; Edwards on *Execution*, pp. 330-348; Robbins on *Mortgages*, pp. 1357-1365; Shelford's *Real Property Statutes*, pp. 454-457.]

SALE OF DEBTOR'S INTEREST IN LAND.

A tenant by *elegit* has not, by mere force of his writ, a title enabling him to sell the lands of his debtor. The power is supplied by the statutory provisions which will be briefly considered in this section. Not that, prior to the statute creating the power, the creditor was left entirely without remedy. The effect of the Statute of Westminster (13 Edw. I. st. 1, c. 18) was to give the creditor a general charge on his debtor's lands. Prior to the Judgments Act, 1838 (1 & 2 Vict. c. 110), a judgment creditor desiring to reach interests in lands of his debtor not extendible under an *elegit* could file a bill in equity to remove the legal difficulty in a suit to redeem prior incumbrancers (*Neate v. Duke of Marlborough*, 1838, 3 Myl. & Cr. 407, and see judgment of Cottenham, L.C.). Sec. 13 of the Judgments Act, 1838

(1 & 2 Vict. c. 110), converted the general charge conferred by the Statute of Westminster into a specific lien (*Bolleston v. Morton*, 1841, 1 Dr. & War. 171). The section provided that a judgment should operate as a charge upon the debtor's lands, and that every judgment creditor should have such and the same remedies against the lands so charged as he would be entitled to in case the judgment debtor had power to charge, and had by writing under his hand agreed to charge the same with the amount of the debt and interest thereon. Subject, therefore, to the provisions of several statutes requiring for the protection of purchasers for value and mortgagees the registration either of the judgment or the writ, the judgment creditor could, by proceedings in Chancery, enforce in the cases to which the section applied the equitable charge conferred by it. The charge created by the section still exists (*In re Anthony, Anthony v. Anthony*, [1892] 1 Ch. 450), though in some of the cases doubts have been expressed whether the section had not in effect been repealed by 27 & 28 Vict. c. 112, s. 1 (see *Hatton v. Haywood*, 1874, 9 Ch. 229). The remedy, however, was at best a cumbersome and circuitous one, for by the express terms of the section no proceedings to enforce the charge could be taken until after the lapse of one year from the time of entering up the judgment.

More direct and summary relief is supplied by the Judgments Act, 1864 (27 & 28 Vict. c. 112). That Act, after providing that no judgment should affect any land until the land had been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority (s. 1), enables the judgment creditor to obtain on petition in a summary way an order of the Court for sale of his debtor's land. The provisions to that effect are as follows:—

Sec. 4. Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognisance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed so far as the same may be found conveniently applicable.

Sec. 5. If it shall appear, on making such inquiries, that any other debt due on any judgment, statute, or recognisance, is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities.

Sec. 6. Every person claiming any interest in such land, through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Two things therefore are requisite to entitle the creditor to an order under the above sections—(1) There must be actual delivery in execution of the land; (2) there must be registration of the writ or other process of execution.

Registration.—(See *In re Pope*, 1886, 17 Q. B. D. 743). Registration is

now governed by the Land Charges, Registration, and Searches Act, 1888 (51 & 52 Vict. c. 51, s. 5).

Actual Delivery in Execution.—The question of what amounts to “actual delivery in execution” within the section has been the subject of many decisions. Where the sheriff can deliver in execution the debtor’s land, and it has been so delivered, no difficulty of course arises. But there are many interests in land which are not extendible under an *elegit*, as (to take a very familiar example) where the interest is an equity of redemption. In such cases where there was a legal impediment to enforcing the judgment at law, the creditor could always, as we have seen, take proceedings to enforce the judgment in equity. Formerly it was necessary that a writ of *elegit* should be issued, though nothing could be obtained under it (*Neate v. Duke of Marlborough*, 1838, 3 Myl. & Cr. 467). That “useless and absurd form” (per Jessel, M. R., *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. p. 285; per Thesiger, L.J., *Ex parte Evans, In re Watkins*, 13 Ch. D. p. 260) need no longer be followed, and it is now well established that the appointment of a receiver by way of equitable execution amounts to actual delivery in execution “by any other legal authority” within the words of the section (see on this subject, *In re Duke of Newcastle*, 1869, L. R. 8 Eq. 700; *Champneys v. Barland*, 1870, 19 W. R. 148; *Hatton v. Haywood*, 1874, L. R. 9 Ch. 229; *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275; *Ex parte Evans, In re Watkins*, 1879, 13 Ch. D. 252; *In re Pope*, 1886, 17 Q. B. D. 743; *Salt v. Cooper*, 1880, 16 Ch. D. 544; and cases collected, Seton, pp. 1722, 1723; Shelford’s *Real Property Statutes*, pp. 477, 479. See, too, EQUITABLE EXECUTION, *infra*). The result of the order of the Court is well summed up in the following words of Mellish, L.J.: “The order of the Court effects as to equitable interests what the action of the sheriff does as to legal interests” (*Hatton v. Haywood*, 1874, L. R. 8 Eq. p. 236).

Who may Apply.—A creditor to whom land has been actually delivered in execution is the only person entitled to apply under the section. Therefore plaintiffs in an administration action, in which sequestration had issued to compel payment into Court of a sum of money, were held not to be creditors within the section, nor the sequestrators (*Johnson v. Burgess*, 1873, L. R. 15 Eq. 398).

Mode of Application.—The application is now made by originating summons (Order 55, r. 9 B).

Form of Order.—See Seton, pp. 1712 *et seq.*; *In re Cooper*, 1889, 37 W. R. 330. Preliminary inquiries have in some cases been dispensed with (*In re Bithray*, 1890, 38 W. R. 60; *In re Calne Rwy. Co.*, 1870, L. R. 9 Eq. 658).

Priorities.—The priorities of judgment creditors are determined by the date at which the writ of *elegit* is lodged with the sheriff, not by the date of the judgment (*Guest v. Cowbridge Rwy. Co.*, 1868, L. R. 6 Eq. 619).

[See Daniell’s *Ch. Pr.* pp. 925–934; Seton, pp. 1712–1723; Shelford’s *Real Property Statutes*, pp. 477–479; Dart’s *Vendors and Purchasers*, pp. 542–548.]

Sale under Conveyancing Act, 1881.—In addition to the power of sale conferred by the statutory provisions we have just considered, a judgment creditor can, in an action for redemption, obtain an order for sale under sec. 25 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). It has been doubted whether, in such case, he can proceed before the expiration of the statutory period of twelve months prescribed by 1 & 2 Vict. c. 110, s. 13 (Dart’s *Vendors and Purchasers*, p. 543).

EQUITABLE EXECUTION.

Origin of Jurisdiction.—The mode of execution which has next to be considered was unknown to the old Courts of Common Law, though constantly resorted to in the Court of Chancery. Under the Judicature Acts it is available to a judgment creditor in all branches of the High Court. (As to the jurisdiction in bankruptcy, see *In re Goudie, Ex parte Official Receiver*, [1896] 2 Q. B. 481.) Owing to the construction which has by judicial decision been placed upon a section of the Judicature Act, 1873 (36 & 37 Vict. c. 66), to be presently referred to, the system has in modern practice acquired a far larger importance, whilst it is applied with much greater ease, than was the case when it was confined to the Courts of Equity.

When Available.—This process is usually termed Equitable Execution. It is available to a judgment creditor on a judgment or order for recovery by or payment to any person of money (see Order 42, rr. 3, 28) where he is unable to reach the property of his debtor by the ordinary methods of execution.

Definition.—The strict accuracy of the term "Equitable Execution" has been questioned in some recent cases; thus in *In re Shephard, Atkins v. Shephard*, 1889, 43 Ch. D. 131, it was said that equitable execution is not a mere form of execution, but a relief producing the same benefit as execution properly so called. Equitable execution is not like legal execution; it is equitable relief which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution (S. C., per Bowen, L.J., p. 137). It is a taking out of the way a hindrance which prevents execution at common law (S. C., per Cotton, L.J., 135).

Original Exercise of Jurisdiction in Equity.—The following passage from Mifford on *Chancery Pleadings*, 4th ed., p. 126, cited in the judgment of Davey, L.J., in the recent case of *Harris v. Beauchamp*, [1894] 1 Q. B. 801, illustrates the principles on which Courts of Equity acted in applying this remedy:—

"Courts of Equity will also lend their aid to enforce the judgments of Courts of ordinary jurisdiction; and therefore a bill may be brought to obtain the execution or the benefit of an *elegit*, or a *fieri facias*, when defeated by a prior title, either fraudulent or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases where Courts of Equity formerly lent their aid the legislature has by express statute provided for the relief of creditors in the Courts of Common Law, and consequently rendered the exercise of this jurisdiction in such cases unnecessary. In any case, to procure relief, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title." The passage in question concludes as follows: "Thus in the cases alluded to, of an *elegit* and *fieri facias*, he must show that he has sued out the writs, the execution of which is avoided, or the defendant may demur, but it is not necessary for the plaintiff to procure returns to those writs."

The power of the Court to grant equitable execution was in the Court of Chancery usually exercised in cases where a debtor had an interest in lands not extendible under an *elegit*. It is, however, available in the case of equitable interests in the debtor's chattels, and of his *choses in action*.

Mode of Equitable Execution.—The mode of granting equitable execution is usually by the appointment of a receiver. The power of the Court, however, is not confined to this remedy. Thus, in the case of cash in Court

not being dividends, and therefore not capable of being reached by a statutory charging order, the Court can now, in virtue of its general jurisdiction, and by way of equitable execution, make an order charging such cash in favour of the judgment creditor (*Brereton v. Edwards*, 1888, 21 Q. B. D. 488). In a proper case also equitable execution may take the shape of an injunction (*Thornton v. Finch*, 1864, 4 Giff. 515); and in several cases an injunction has been granted in aid of equitable execution by appointment of a receiver (*Oliver v. Lowther*, 1880, 28 W. R. 381; *Gillet v. Gillet*, 1889, 14 P. D. 158; *Westhead v. Riley*, 1883, 25 Ch. D. 413).

Effect of Judicature Act, 1873, s. 25 (8).—The power of granting receivers has been greatly enlarged by sec. 25 (8) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), which provides that a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made (see *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275). Whenever, therefore, it appears to the Court "just or convenient" that a receiver should be appointed, the discretion conferred by the section will be exercised in the direction of making the order.

The discretion, however, will be exercised on certain well-defined principles. Thus, relief will not be granted now in cases where before the Judicature Act no such relief could have been obtained (*Holmes v. Millage*, [1893] 1 Q. B. 551; *Manchester and Liverpool District Bank v. Parkinson*, 1888, 22 Q. B. D. 173; *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Wills v. Luff*, 1888, 38 Ch. D. 197). Before the Act "Courts of Equity gave relief where a legal right existed, and there were legal difficulties which prevented the enforcement of that right at law. The existence of a legal right is essential to the exercise of the jurisdiction" (*Holmes v. Millage* (*ubi sup.*), per Lindley, L.J., p. 555). Therefore a receiver ought not to be appointed where there is no impediment to legal execution and no special circumstances making the appointment "just or convenient," nor where it is shown that the property can be taken in legal execution (*Manchester and Liverpool District Bank v. Parkinson*, 1888, 22 Q. B. D. 173). There is no jurisdiction to appoint a receiver merely because under the circumstances of the case it would be a more convenient mode of execution (*Harris v. Beauchamp*, [1894] 1 Q. B. 801). Again, the order will not be made unless the proper parties are before the Court (*In re Shephard*, *Atkins v. Shephard*, 1889, 43 Ch. D. 131). And again, in very small cases, where the expense is disproportionate to the benefit, the application will be refused (*I. v. K.*, W. N. (1884) 63; R. S. C. 1883, Order 50, r. 15A). Subject, however, to such considerations as above stated, there is now no limit to the power of the Court to appoint a receiver, provided that it be proved to be "just or convenient."

In what Cases Granted.—It would take us too far to attempt anything like an exhaustive enumeration of the cases in which an order for equitable execution can be obtained. It must suffice to direct attention to some of the leading decisions on the subject as illustrating the principles on which the Court acts.

The subject appears naturally to divide itself into two main heads:—

1. Equitable execution in respect of land.
2. Equitable execution in respect of personal property.

Equitable Execution against Land.—Under the practice of the Court of Chancery, where land was not extendible under an *elegit* on account of legal obstacles, it was necessary that an *elegit* should be issued, and a bill to remove legal impediments was demurrable which did not allege the issue of the writ. The leading authority on the subject is *Neate v. The Duke of*

Marlborough, 1838, 3 Myl. & Cr. 407, which, and especially the judgment of Cottenham, L.C., should be consulted (see, too, *Angell v. Draper*, 1686, 1 Vern. 898; *Shirley v. Watts*, 1744, 3 Atk. 200). In *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275, and in *Ex parte Evans, In re Watkins*, 1879, 13 Ch. D. 252, the issuing of a writ which could by no possibility result in satisfying any part of the judgment was denounced as "a useless and absurd form." Accordingly no *elegit* need now be issued, but the Court will, when satisfied that the case is one for relief, make an order for a receiver.

Effect of Order.—The order operates as a charge on the land (*Ex parte Evans, In re Watkins, (ubi sup.)*), and amounts to "actual delivery in execution" within sec. 1 of the Judgment Law Amendment Act, 1864 (27 & 28 Vict. c. 112), so as to entitle the judgment creditor to apply for an order for sale under sec. 4 of that Act (*Hatton v. Haywood*, 1874, L. R. 9 Ch. 229; *Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275; *Salt v. Cooper*, 1880, 16 Ch. D. 544; *Smith v. Cowell*, 1881, 6 Q. B. D. 75; *In re Pope*, 17 Q. B. D. 743). In *Anglo-Italian Bank v. Davies, Salt v. Cooper, Smith v. Cowell*, the interests of the respective debtors were equities of redemption, and therefore not extendible under an *elegit*. In *In re Pope*, however, the interest was a legal one subject to prior equitable charges, and an *elegit* might have issued, but equitable execution was held the more convenient remedy considering the difficulty of working out the rights of a judgment creditor under an *elegit* in such a case.

A debtor's equitable reversionary interest in the proceeds of the sale of land cannot be reached by an *elegit*; in such a case it is proper to appoint a receiver (*Tyrrell v. Painton*, [1895] 1 Q. B. 202).

The rents and profits of the debtor's land will be collected by a receiver appointed by way of equitable execution, as in other cases. The judgment creditor, by obtaining the appointment of a receiver, is put in the position of being able to bring an action to redeem prior incumbrancers (*Beckett v. Buckley*, 1874, L. R. 17 Eq. 435). Whether he is entitled to an order for sale or for foreclosure, *quære* (Seton, p. 1723; Dart's *Vendors and Purchasers*, p. 543).

Priorities.—The receiver will be appointed subject to the rights of prior incumbrancers. The judgment creditor takes subject to all existing equities. He cannot, by giving notice of the order granting him equitable execution, obtain priority (*Arden v. Arden*, 1885, 29 Ch. D. 702).

Registration.—The order must be registered under the Land Charges, Registration, and Searches Act, 1888 (51 & 52 Vict. c. 51, s. 5), in order to be binding against a purchaser for value (s. 6).

Bankruptcy.—By sec. 45 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), an execution creditor will not be entitled to retain the benefit of his execution unless he has completed it before the date of the receiving order in bankruptcy, and before notice of the presentation of any petition by or against the debtor, or of the committing of any available act of bankruptcy by him. An execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver (s. 45 (2)).

Equitable Execution in respect of Interests in Personality.—Precisely the same principles apply in the case of personal property of the debtor as guide the Court in granting equitable execution in the case of interests in his realty (see *Manchester and Liverpool Bank v. Parkinson*, 1888, 22 Q. B. D. 173, where it was held that the order would not be made where there was no legal impediment to seizure of the goods under a *fiери facias*).

Debtor's Choses in Action.—Equitable execution has been granted in the case of a fund in Court payable to the debtor (*Westhead v. Riley*, 1883, 25 Ch. D. 413); of the debtor's reversionary interest under a will (*Fuggle v. Bland*, 1883, 11 Q. B. D. 711; *Tyrrell v. Painton*, [1895] 1 Q. B. 202); of his share in a syndicate (*In re Coney, Coney v. Bennett*, 1885, 29 Ch. D. 993, where the debtor was abroad and therefore could not be attached).

Married Women.—Equitable execution has been granted over the separate property of a married woman (*Bryant v. Bull*, 1878, 10 Ch. D. 153; *In re Peace & Waller*, 1883, 24 Ch. D. 405). But it will not be granted where the married woman is restrained from anticipation (*Hill v. Cooper*, [1893] 2 Q. B. 85). And a receiver cannot be appointed of the arrears of income subject to restraint on anticipation due after the date of the judgment (*Hood-Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Whiteley v. Edwards*, [1896] 2 Q. B. 48); but *secus* as to the arrears due at or prior to the judgment (*Hood-Barrs v. Heriot*, [1896] App. Cas. 174).

Under the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), sec. 2, costs payable by a married woman under the provisions of the Act may be enforced by appointment of a receiver.

Orders for Payment of Money into Court.—Such orders may be enforced by appointment of a receiver (*In re Coney, Coney v. Bennett*, 1885, 29 Ch. D. 993; *In re Whiteley, Whiteley v. Learoyd*, 1887, 56 L. T. 846).

Where not Available.—Orders have been refused in the case of future earnings (*Holmes v. Millage*, [1893] 1 Q. B. 551); of pensions made inalienable by statute (*Lucas v. Harris*, 1886, 18 Q. B. D. 127; *Croove v. Price*, 1888, 22 Q. B. D. 429); of entrance fees of a theatre (*Cadogan Lyric Theatre*, [1894] 3 Ch. 338).

Title of Receiver when Complete.—When the receiver has completed his security his title relates back to the date of the order appointing him (*In re Evans, Ex parte Watkins*, 1879, 13 Ch. D. 252).

Effect of Order.—An order appointing a receiver of the goods of the debtor does not constitute the judgment creditor a secured creditor within sec. 9 of the Bankruptcy Act, 1883 (*In re Dickinson, Ex parte Charrington*, 1888, 22 Q. B. D. 187; *In re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648). Nor does it make him a secured creditor within sec. 87 of the Companies Act, 1882 (*Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154).

Sale of Goods.—The Court has no power to make a declaration of charge upon a judgment debtor's reversionary personalty in favour of a judgment creditor who has obtained an order for equitable execution (*Flegg v. Prentis*, [1892] 2 Ch. 428; *De Peyreave v. Nicholson*, 1894, 42 W. R. 702).

Practice.—It is no longer necessary to institute a separate action in order to obtain the appointment of a receiver (*Anglo-Italian Bank v. Davies*, 1878, 9 Ch. D. 275; *Salt v. Cooper*, 1880, 16 Ch. D. 544). The term "interlocutory order" used in sec. 25 (8) of the Judicature Act, 1873, is not confined to an order made between writ and judgment, but means an order other than final judgment, and whether before or after judgment (*Smith v. Conwell*, 1881, 6 Q. B. D. 75).

The application should not be made *ex parte*, except in cases of great urgency (*Lucas v. Harris*, 1886, 18 Q. B. D. 127; *In re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648).

Relief against Receiver.—A party seeking relief against improper acts of the receiver should apply in the action in which the receiver has been appointed (*Searle v. Choat*, 1884, 25 Ch. D. 723).

It is not intended here to deal with any questions affecting receivers

generally, or their duties (see RECEIVERS; and see R. S. C., 1883, Order 50, rr. 15 a-22).

[As to Equitable Execution generally, see Anderson on *Execution*, pp. 489-510; Edwards on *Execution*, pp. 296-330; Cababé on *Attachment of Debts and Equitable Execution*; Kerr on *Receivers*; Seton, pp. 666-669; *Ruling Cases*, vol. x. pp. 570-613.]

OTHER MODES OF ENFORCING JUDGMENTS BY ORDER.

Before finally passing from the subject of execution against property, attention may be directed to certain remedies which, even if not strictly to be classified as modes of execution, afford facilities in certain cases for enforcing judgments or orders of the Court.

Execution of Instruments by Order of Court.—The Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14, provides that where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court shall nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it (see *In re Edwards, Owen v. Edwards*, 1885, 33 W. R. 578; *Howarth v. Howarth*, 1886, 11 P. D. 68; *In re Cathcart*, [1893] 1 Ch. 466).

Execution of Contract, etc., by Order of Court.—Order 42, r. 30, of the Rules of the Supreme Court provides that if a mandamus, mandatory order, injunction, or judgment for specific performance of a contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained, and costs. As to this rule, see *Mortimer v. Wilson*, 1885, 33 W. R. 927.

Vesting Orders.—By the Trustee Act, 1893 (56 & 57 Vict. c. 53, ss. 30-33), where any Court gives a judgment or makes an order directing the sale or mortgage of any land, the Court may make an order vesting the land in the purchaser or mortgagee, or may appoint a person to convey the land (see VESTING ORDER).

B. EXECUTION AGAINST THE PERSON.

Besides the modes of execution against property which have already been discussed, the party desiring to enforce a judgment or order is in certain cases entitled to apply to the Court for leave to issue process against the person of the defendant. In dealing with the question of execution against property, it has been seen that the methods in use are numerous, some of them of very ancient origin, others the result of more modern legislation, and that they vary according to the form of the judgment and the nature of the property which it is desired to reach. A far less extensive field of observation has to be covered in considering the forms of execution available against the person. And this for two reasons. In the first place,

personal process can be resorted to in comparatively few cases, whilst it is not available on judgments for enforcing mere money demands (by far the largest class), unless in cases within the exceptions to sec. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). Secondly, the methods of enforcing such execution, so far from being numerous, are but two in number. Formerly, indeed, a judgment creditor was entitled, on a judgment for payment of money, to a writ of *capias ad satisfaciendum* (familiarily known as a *ca. sa.*), under which he could take his debtor's body in satisfaction of the debt. It is stated in a practice work of great authority that a *ca. sa.* may still be issued in certain cases (Chitty's *Arch.* p. 891). However that may be, for practical purposes the writ has been obsolete since the abolition of imprisonment for debt; it will not therefore be discussed here. The only methods of execution against the person which it will be necessary to consider are—(1) Attachment; (2) Committal.

Distinction between Attachment and Committal.—Before proceeding further a few remarks may be made upon the difference between attachment and committal. The distinction is a fine one, and since the Judicature Acts of no great importance. Each process being founded on contempt, and the result of each being in effect identical, it is unquestionable that popularly attachment and committal are treated as convertible terms, and “attaching” or “committing” a defendant as but synonymous names for the same process. As will be seen presently, the two remedies differ as to service necessary, and as to the officer charged with the duty of carrying them into execution respectively. In some of the cases this latter has been treated as constituting the sole distinction between attachment and committal (see *Sprunt v. Pugh*, 1878, 7 Ch. D. 567; *Harvey v. Harvey*, 1884, 26 Ch. D. 644; *R. v. County Court Judge of Lambeth*, 1887, 1888, 36 W. R. 475). In *Calley v. Young*, 1887, 56 L. T. 147, however, the question was considered by Chitty, J., who pointed out that there was a real difference between the two remedies—“Committal was the proper remedy for doing a prohibited act, and attachment was the proper remedy for neglecting to do some act ordered to be done.” This distinction may be still important in some cases (see the valuable memorandum on the subject by Mr. Registrar Lavie, printed in the footnotes to *In re Evans, Ex parte Noton*, [1893] 1 Ch. 282), though practically abolished by Order 42, r. 7.

WRIT OF ATTACHMENT.

“The process of attachment is as antient as the law itself, and this is necessarily so; for if laws were without a competent authority to secure their administration from contempt they would be vain and nugatory. A power, therefore, in the Supreme Courts of Justice, to suppress such contempts, by the attachment of the offender, results from the first principles of a judiciary, and must be an inseparable attendant upon every superior tribunal; and accordingly we find that the jurisdiction to attach for contempt has in fact been exercised as early as the annals of our laws extend” (Stephen's *Commentaries*, 12th ed., vol. iv. p. 304).

Form.—In form an attachment is a writ addressed to the sheriff requiring him to attach the defendant to answer for his contempt (see Form R. S. C., App. H, No. 12; Daniell's *Ch. Forms*, p. 397).

It is provided by the Rules of the Supreme Court, 1883, that a writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division formerly had (Order 44, r. 1).

Difference between Attachments at Law and in Chancery.—A writ of attachment at law differed widely from one issued out of the Court of

Chancery, the difference no doubt being due to the fact that Courts of equity acted *in personam*, whilst Courts of law acted *in rem* (see per Chitty, J., *Harvey v. Harvey*, 1884, 26 Ch. D. 644). At law an attachment was, except when issued to enforce payment of costs, a process of criminal character, the civil remedy being, in case of a judgment for the payment of money, a *ca. sa.* It was only, again, where a contempt was committed in face of the Court itself, or where a person had disobeyed a *rule of Court* made against him, that process in the nature of execution could be taken against his person, and enforced by writ of attachment (Edwards on *Execution*, p. 211; see Tidd's *Pr.* p. 478). Leave was always required before the writ could issue. Prior to the Judicature Acts the writ always issued from the Crown side of the Court in all cases in the Queen's Bench, whether the proceedings were on the Crown side or Plea side of the Court (Short's *Crown Office Practice*, p. 302).

In Chancery the writ was employed both as *mesne* process to compel appearance, and to enforce decrees and orders for payment of money, and decrees and orders to do other acts. We are not concerned to discuss the writ so far as related to *mesne* process. In other cases it usually issued without order on production to the proper officer of the order directing the act to be done and evidence of default in doing it (Cons. Order 29, r. 3). At law a judgment creditor who elected to take the person of his debtor in execution to satisfy his debt was held to have lost his right to resort to the debtor's property. *Aliter* in Chancery. "It never has been held, and cannot legitimately be held, that the seizing of the person of a debtor for contempt of this Court is a release of the debt against the property of that person" (*Roberts v. Ball*, 1855, 3 Sm. & G. 168).

Where available.—A writ of attachment may issue in the following cases :—

- (1) On a judgment for recovery by or payment to any person of money in cases within the exceptions to sec. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 4: Order 42, r. 3).
- (2) On a judgment for payment of money into Court in cases where attachment is authorised by law, *i.e.* when they are within the exceptions of the Debtors Act, 1869, s. 4 (Order 42, r. 4).
- (3) On a judgment for recovery of any property other than land or money (Order 42, r. 6).
- (4) On a judgment requiring any person to do any act other than the payment of money or to abstain from doing anything (Order 42, r. 7).
- (5) Against the directors or other officers of a corporation on a judgment or order against such corporation which has been wilfully disobeyed (Order 42, r. 31).
- (6) Against a person failing to comply with any order to answer interrogatories, or for discovery or inspection of documents (Order 31, r. 21).
- (7) Against a solicitor upon whom an order against any party for interrogatories, or discovery, or inspection is served, and who neglects without reasonable excuse to give notice thereof to his client (Order 31, r. 23).
- (8) Against a solicitor not entering an appearance or putting in bail or paying money into Court in lieu of bail in an Admiralty action *in rem*, in pursuance of his written undertaking so to do (Order 12, r. 18).

Under the Debtors Act, 1869, s. 4.—The Debtors Act, 1869 (32 & 33

Vict. c. 62, s. 4), abolished arrest or imprisonment for making default in payment of a sum of money, except in the following cases:—

- (1) *Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract.*
- (2) *Default in payment of any sum recoverable summarily before a justice or justices of the peace.*
- (3) *Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of equity any sum in his possession or under his control.*
- (4) *Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order.*
- (5) *Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorised to make an order.*
- (6) *Default in payment of sums in respect of the payment of which orders are in this Act authorised to be made.*

Default by a Trustee, etc.—A “person acting in a fiduciary capacity” in subsec. (3) means a person who stands in a fiduciary relation towards any other person who may be entitled to call upon him to pay, whether such person is or is not the plaintiff, or one of the plaintiffs in the action in which the order for payment has been made (*Marris v. Ingram*, 1879, 13 Ch. D. 338). On this point the following authorities may be consulted:—*Digby v. Turner*, 1873, 21 W. R. 471 (attachment ordered against a trustee who had failed to comply with an order to transfer stock); *Preston v. Ethelington*, 1887, 37 Ch. D. 104 (attachment ordered on default in payment into Court of a sum admitted by a trustee to be in his hands, and ordered to be brought into Court); *Crowther v. Elyood*, 1887, 34 Ch. D. 691 (the case of an auctioneer); *Litchfield v. Jones*, 1887, 36 Ch. D. 530 (the case of the London agent of a country solicitor); *In re Gent, Gent-Davis v. Harris*, 1888, 40 Ch. D. 190 (the case of a receiver); *Tinnuchi v. Smart*, 1885, 10 P. D. 184 (the case of an administrator whose grant had been revoked).

The words do not apply to the case of a partner who has received moneys on behalf of his firm (*Piddocke v. Burt*, [1894] 1 Ch. 343); nor of a director who has been ordered, under sec. 165 of the Companies Act, 1862, to pay the value of unpaid shares received by him from the promoter upon which no money had been paid (*In re Diamond Fuel Co., Metcalf's case*, 1880, 13 Ch. D. 815); nor of a promoter ordered to repay money received under a fraudulent sale by him to the company (*Phosphate Sewage Co. v. Hartmart*, 1877, 25 W. R. 743); nor of a creditor who has received money from a bankrupt by way of fraudulent preference, and has been ordered to pay it to the trustee of the bankrupt's estate (*Ex parte Hooson, In re Chapman and Shaw*, 1872, L. R. 8 Ch. 231); nor an execution creditor who has made default in payment of an amount ordered to be paid to the claimant (*Buckley v. Crawford*, [1893] 1 Q. B. 105).

“*Possession or Control.*”—For the purpose of bringing a trustee within the exception it must appear that the money ordered to be paid by him has at some time or other been actually in his possession or under his control; therefore no attachment can be issued against a trustee on an order directing the payment of a sum composed of principal and interest not distinguished, inasmuch as the interest might not at any time have been in his possession (*Middleton v. Chichester*, 1871, L. R. 6 Ch. 152). A trustee who has been ordered to pay money which he has neglected to recover is not within the exception (*Ferguson v. Ferguson*, 1875, L. R. 10 Ch. 661); nor a trustee who is not proved ever to have had the trust moneys in his hands (*In re Hickey, Hickey v. Colmer*, 1886, 35 W. R. 53); nor a trustee who,

having improperly sold bonds in breach of his trust, has been ordered to make good the difference between their value at the time of sale and at the date of the judgment respectively (*In re Walker, Walker v. Walker*, 1890, 38 W. R. 766, following *Cronin v. Twinberron*, 1887, W. N. 201). The money need not have been in the sole possession or under the sole control of the trustee (*Evans v. Bear*, 1874, L. R. 10 Ch. 76).

Default by an Attorney or Solicitor, etc.—As to subsec. (4), the following cases may be consulted:—*In re Rush*, 1870, L. R. 9 Eq. 147; *In re White*, 1870, 19 W. R. 39 (default in payment of balance found due on taxation); *In re a Solicitor*, [1893] 2 Ch. 66 (default in payment of costs of taxation); *Tilney v. Stansfield*, 1880, 28 W. R. 582 (attachment ordered against a solicitor on default by him of payment of costs ordered to be paid by him of vexatious and frivolous proceedings); *Jenkyns v. Fereday*, 1872, L. R. 7 C. P. 358 (default in payment of costs of an action brought by a solicitor without the plaintiff's authority, ordered to be paid by the solicitor); *In re Dudley, Ex parte Monet*, 1883, 12 Q. B. D. 44 (default in payment by a solicitor of a balance ordered to be paid to his client).

But where a solicitor is ordered to pay costs simply as an unsuccessful litigant, he is not within the exception (*In re Hope*, 1872, L. R. 7 Ch. 523).

Nature of Jurisdiction.—Disobedience by a solicitor to an order made against him as an officer of the Court is a contempt of a criminal nature, and process under subsec. (4) is of a punitive and disciplinary character, and not merely of the nature of civil process (*In re Freston*, 1883, 11 Q. B. D. 545; *In re Dudley, Ex parte Monet*, 1883, 12 Q. B. D. 44; *In re Strong*, 1886, 32 Ch. D. 342; *In re Wray*, 1887, 36 Ch. D. 138; *In re Grey*, [1892] 2 Q. B. 440).

Change in Position of Debtor.—The fact that the solicitor has been struck off the rolls since the order was made is immaterial (*In re Strong*, 1886, 32 Ch. D. 342). And, on the same principle, a party who has been ordered to pay money as a receiver may be attached for non-payment, though he has ceased to be a receiver (*In re Gent, Gent-Davis v. Harris*, 1888, 40 Ch. D. 190).

Periods to be considered.—The rule was thus stated in *In re Strong*, 1886, 32 Ch. D. 342: Of the three possible periods that can be looked at for ascertaining whether the person ordered to pay and making default holds the character of a trustee or person acting in a fiduciary capacity (subs. 3), or a solicitor (subs. 4), viz. (1) the act done, (2) the order made, or (3) the default committed, the proper period is, in case of a trustee the first, and in case of a solicitor, if not the first, at the latest the second.

Waiver.—Where a solicitor had been ordered to pay a sum of money by a certain day, and afterwards an arrangement was made for payment by instalments, and he subsequently made default, it was held that no attachment could issue for non-compliance with the original order (*Harvey v. Hall*, 1873, L. R. 16 Eq. 324). But where, after default in complying with the order for payment, an order for attachment was made, and the parties prosecuting such order agreed to suspend the writ upon a payment on account being made, it was held that the right to enforce the writ of attachment was not gone (*In re Fereday*, [1895] 2 Ch. 437).

Debtors Act, 1878, s. 1.—Owing to the harsh construction which the judges felt compelled to give to subsecs. 3 and 4 of the Debtors Act, 1869, s. 4, the Debtors Act, 1878 (41 & 42 Vict. c. 54), was passed. It appears to have been suggested by Sir George Jessel. See judgment of that learned judge in *Marris v. Ingram*, 1879, 13 Ch. D. p. 343.

Sec. 1 of the Act is as follows :—

In any case coming within the exceptions numbered 3 and 4 in the 4th section of the Debtors Act, 1869, and in the 5th section of the Debtors Act (Ireland), 1872, respectively, or within either of those exceptions, any Court or judge, making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisos contained in the said sections respectively) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder.

Effect of Act.—"It was not intended by the Amendment Act to get rid of the penal clauses of the previous Act, but only to give the judges a judicial discretion to deal with those exceptional cases which the Legislature did not think of when it passed the previous Act" (*Marris v. Ingram*, 1879, 13 Ch. D. p. 343, per Jessel, M. R.). The Debtors Act was intended for the punishment of fraudulent or dishonest debtors, and is to that extent vindictive and intended to be so (*ibid.*). Mere inability to pay is no reason for refusing attachment (*In re Gent*, *Gent-Davis v. Harris*, 1888, 40 Ch. D. 190; and see *In re Knowles*, *Doodson v. Turner*, 1883, 52 L. J. Ch. 685. See, too, *In re Dudley*, 1883, 12 Q. B. D. 44; *In re Preston*, 1883, 11 Q. B. D. 545; *In re Wray*, 1887, 36 Ch. D. 138).

It is not necessary in order to get an attachment against a trustee to prove actual moral culpability (*Evans v. Bear*, 1874, L. R. 10 Ch. 76; *Preston v. Etherington*, 1887, 37 Ch. D. p. 110). An attachment has been refused where no benefit could result, and bankruptcy proceedings would be embarrassed (*In re Wray*, 1887, 36 Ch. D. 138); and where the trustee had not been morally culpable, and had derived no personal benefit from the misapplication of the trust funds (*Aylesford (Earl of) v. Earl Poulett*, [1892] 2 Ch. 60; and see *In re Smith*, [1893] 2 Ch. 1).

Bankruptcy.—The protection afforded by sec. 9 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), does not prevent attachment issuing against persons within the exceptions to sec. 4 of the Debtors Act, for the remedy is punitive and disciplinary (*In re Smith*, *Hands v. Andrews*, [1893] 2 Ch. 1; *In re Eddy*, 1891, 39 W. R. 198; *In re Wray*, 1887, 36 Ch. D. 138).

Discretion.—The Court of Appeal will not usually interfere with the discretion under the Act exercised by the Court below (*Preston v. Etherington*, 1887, 37 Ch. D. 104; *Crowther v. Elgood*, 1887, 34 Ch. D. 698; *In re Wray*, 1887, 36 Ch. D. p. 145), unless the discretion has been exercised on an erroneous ground (*In re Smith*, *Hands v. Andrews*, [1893] 2 Ch. 1).

Duration of Imprisonment.—Under the Act imprisonment is limited to one year. A note to that effect is now appended to the writ of attachment. No order for discharge is therefore any longer necessary (*In re Edwards*, *Brooke v. Edwards*, 1882, 21 Ch. D. 230). See O. 42, r. 5.

[As to the Debtors Acts and procedure thereunder, see Oswald on *Contempt of Court*, pp. 72–87; Vaughan Williams on *Bankruptcy*, pp. 624–653; Seton, pp. 384–386.]

General Principle.—With regard to the cases in which, as we have shown, the Rules of the Supreme Court provide that the remedy by attachment is available, the governing principle would seem to be this, that an "ordinary contempt" of Court has been committed by breach of an order made by the Court, or of an undertaking given to the Court; and that therefore the party who suffers is entitled to invoke the aid of the Court by process of contempt, or, in other words, by writ of attachment or

order of committal (Order 42, r. 7). In cases which do not come within that rule, those, namely, in which there has been no breach of a judgment or order, but what is known as a "special contempt," committed by disrespect to the authority of the Court, it is submitted that the proper remedy is still order for committal rather than writ of attachment.

Issue of Attachment, Leave.—No writ of attachment can now issue without leave of the Court or a judge (Order 42, r. 2). This rule is of universal application, and the former practice of applying *ex parte* is gone (*Abud v. Riches*, 1876, 2 Ch. D. 528; *Jupp v. Cooper*, 1879, 5 C. P. D. 26; *Eynde v. Gould*, 1882, 9 Q. B. D. 335; *Delmar v. Freemantle*, 1878, 3 Ex. D. 237).

Service of Order.—Before applying, it is essential that the order sought to be enforced should be personally served, except in the case of an order for discovery (*Joy v. Hadley*, 1883, 22 Ch. D. 571). In a proper case an order for substituted service can be obtained under Order 67, r. 6.

The order must bear the indorsement prescribed by Order 41, r. 5 (*Hampden v. Wallis*, 1884, 26 Ch. D. 746; *Treherne v. Dale*, 1884, 27 Ch. D. 66; *Pace v. Pace*, 1891, 67 L. T. 383), except in the case of a merely prohibitive order (*Selous v. Croydon Local Board*, 1885, 53 L. T. 209). An attachment was refused where the evidence failed to show that the copy order served bore the prescribed indorsement (*Stockton Football Co. v. Gaston*, [1895] 1 Q. B. 453).

The order must be served within the time fixed for doing the act ordered (*Duffield v. Elwes*, 1840, 2 Beav. 268); otherwise a supplemental order will be required, fixing a fresh time. Whether the term "forthwith" is a sufficient expression of time, *quære* (*Thomas v. Nokes*, 1868, L. R. 6 Eq. 521; *Gilbert v. Endean*, 1878, 9 Ch. D. 259).

Service of Notice of Motion.—It has been much discussed whether personal service of a notice of motion for attachment is necessary (*Browning v. Sabin*, 1877, 5 Ch. D. 511; *Joy v. Hadley*, 1883, 22 Ch. D. 571; *In re a Solicitor*, 1880, 14 Ch. D. 152; *Mann v. Perry*, 1881, 50 L. J. Ch. 251; *In re Bassett*, *Bassett v. Bassett*, [1894] 3 Ch. 179). In the last-named case North, J., refused to follow the previous decisions in *In re Morris*, *Morris v. Fowler*, 1890, 44 Ch. D. 151, and *In re Evans*, *Evans v. Noton*, [1893] 1 Ch. 352, and to treat the filing of a notice of motion against a defendant who had not appeared as sufficient service, it appearing that the applicant knew the address of the defendant. The true rule appears to be that stated in the memorandum of Mr. Lave (*In re Evans*, *Evans v. Noton*, [1893] 1 Ch. 252 (n)), viz. that "a notice of motion for leave to issue an attachment which, but for the judicature rules, the party moving would have been entitled to issue without leave, does not require to be personally served, but that a notice of motion for leave to issue an attachment, which the party moving could never have issued without leave, requires, as before the Act, to be personally served."

Not only must the notice of motion be served, but copies of the evidence on which the applicant intends to rely must be served at the same time (Order 52, r. 4; and see notes thereto and cases cited, *Annual Practice*, 1898).

By whom Order made.—The order for leave to issue an attachment must in all cases be made by the judge in person. In the Queen's Bench Division a judge in chambers can give leave (*Sam Kyrburg v. Posnanski*, 1884, 13 Q. B. D. 218). A master has no power to make the order (Order 54, r. 12 (a)). In the Chancery Division it is better that the order should be made in open Court (*Davis v. Galmoye*, 1888, 39 Ch. D. 322; but see *S. C.*, 1889, 40 Ch. D. 355). A master in lunacy can direct an attachment

to issue to enforce the attendance of a supposed lunatic, but in ordinary cases he should refer such an application to the Court (*In re B.*, [1892] 1 Ch. 459).

Arrest.—If the order for issue of the attachment be made, the writ will be issued in the Central Office, and lodged with the sheriff or other officer, whose duty it is to execute it with all speed.

The sheriff may not arrest the defendant on a Sunday (Lord's Day Act, 1677, 29 Car. II. c. 7, s. 6). As to the mode of arrest, see Mather's *Sheriff Law*, p. 177. As a rule, the sheriff cannot, on the principle of *Semayne's* case, which has been already referred to more than once, break open the outer door. But the principle does not apply to a case where the order for attachment is made by reason of wilful contempt or contempt criminal in its nature (and not merely a civil process to enforce a judgment in favour of a party). In such case the officer charged with the execution of the writ may, if necessary for the purpose of executing it, break open the outer door of the house of the person to be arrested (per Chitty, J., *Harvey v. Harvey*, 1884, 26 Ch. D. 644; and see *Briggs' case*, 1615, 1 Rolle, 336; *Burdett v. Abbott*, 1811, 14 East, 1, and at pp. 157, 158). It would seem, therefore, that the outer door can only be broken in cases of contempts criminal in their nature, and the punishment for which is disciplinary (Oswald on *Contempt*, p. 116).

Privilege from Arrest.—Certain persons are privileged from arrest on civil process, as, *e.g.*, persons enjoying privilege of Parliament, ambassadors or their servants, officers of the Courts, and in particular all persons engaged in litigation, *eundo, morando, et redeundo* (*Meekins v. Smith*, 1791, 1 Black. H. 636; see Oswald on *Contempt*, pp. 133–147; and for a very full list of privileged persons, Mather's *Sheriff Law*, pp. 182–187).

The privilege does not extend to cases of arrest for contempt of a criminal nature (*Lechmere Charlton's case*, 1836, 2 Myl. & Cr. 316; *Long Wellcley's case*, 1831, 3 Russ. & M. 639; *Onslow and Whalley's case*, 1873, L. R. 9 Q. B. 219; *In re Gent*, *Gent-Davis v. Harris*, 1888, 40 Ch. D. 190); nor to cases where the attachment is of a punitive character (*In re Freston*, 1883, 11 Q. B. D. 545; *In re Dudley*, 1883, 12 Q. B. D. 44).

Costs.—The costs of an attachment are in the discretion of the Court (*Abud v. Riches*, 1876, 2 Ch. D. 528). A defendant cannot be committed for default in payment of the costs of an attachment (*Michellthwaite v. Fletcher*, 1879, 27 W. R. 793).

Appeal.—An appeal lies from an order for attachment or committal (*Jarmain v. Chatterton*, 1882, 20 Ch. D. 493). But *secus*, where the contempt is one of a criminal character, for then sec. 47 of the Judicature Act, 1873, applies (*O'Shea v. O'Shea*, 1889, 15 P. D. 59).

The discretion of the Court below will not be readily interfered with by the Court of Appeal (*Ashworth v. Outram*, 1877, 5 Ch. D. 943; *Esdaille v. Visser*, 1880, 13 Ch. D. 421).

Return to Writ.—As to the returns which can be made to a writ of attachment, see Daniell's *Ch. Pr.* p. 887; Mather's *Sheriff Law*, pp. 198–204. In the event of a return of *non est inventus*, the person prosecuting the contempt is entitled at his option either to resort to sequestration or to an order for the serjeant-at-arms (Daniell's *Ch. Pr.* pp. 888, 889). As to serjeant-at-arms, see *G. v. L.*, [1891] 3 Ch. 126.

Party in Contempt not entitled to be heard.—Parties in contempt must clear their contempt before they can be heard. "And upon this head it is to be observed, as a general rule, that the contemnor who is in contempt is never to be heard by motion or otherwise till he hath

cleared his contempt and paid the costs, as, for example, if he comes to move for anything or desires any favour from the Court, if the other side says or insists that he is in contempt, though it is but an attachment for want of an answer, which, if not executed, is only ten shillings, and if executed, is twelve shillings and sixpence, yet even in this case he is not entitled to be heard until he hath paid these costs, however small they are" (Gilbert's *Forum Romanum*, 102, cited; Edwards on *Execution*, p. 225; and see Daniell's *Ch. Pr.* p. 904). In modern practice the strictness of the rule has been greatly relaxed.

Discharge of Writ.—In case of irregularity in obtaining an order for issue of the writ, an order can be moved for, for its discharge. In such case the provisions of Order 70, r. 2, must be complied with.

Release.—In cases not within the exceptions to sec. 4 of the Debtors Act, 1869 (as to which the imprisonment lasts for one year only, as has already been stated), an order for discharge must be obtained (see Seton, pp. 411-416).

It cannot now be made a term of discharge that the defendant, who has cleared his contempt, should pay the costs of his contempt and of the action to discharge it (*Jackson v. Marby*, 1875, 1 Ch. D. 86). But cf. WARD.

COMMITTAL.

Committal distinguished from Attachment.—The main distinction between attachment and committal has already been pointed out, viz. that attachment was ordered against a person for not doing what he was ordered to do, whilst he was committed for doing what he ought not to do. This difference, which, before the Judicature Acts, was well established, is now to a great extent done away in consequence of the terms of Order 42, r. 7. "A large class of cases, however, remains unaffected by this rule; as, for example, where there is a breach of an undertaking, misconduct towards a ward, interference with a receiver, unjustifiable comments on a pending case, or what may be called personal contempt of the Court, in none of which is there any enforcement of an order to do or abstain from doing anything" (Memorandum of Mr. Registrar Lavie, *In re Evans, Ex parte Noton*, [1893] 1 Ch. 282 (n)). Where it appeared that the proper remedy was committal and not attachment, and a motion for attachment was made, leave was given to amend the notice of motion (*Callow v. Young*, 1887, 56 L. T. 147).

There are other points in which the two processes differ. An attachment is a writ addressed to the sheriff; committal is effected by an order of the Court, handed to the tipstaff, who executes it on obtaining the warrant of the Lord Chancellor. In the case of an order to commit, the contemnor is confined in Holloway Prison, instead of in the gaol of the county in which he was arrested (as is the case where the defendant is taken under an attachment).

Service of Notice of Motion.—In the case of a motion to commit, the service must in all cases be personal (*Angerstein v. Hunt*, 1801, 6 Ves. 487; *Ellerton v. Thirsk*, 1820, 1 Jac. & W. 376; *Hope v. Carnegie*, 1868, L. R. 7 Eq. 254; *Mander v. Fulcke*, [1891] 3 Ch. 488); though in this, as in other cases, an order for substituted service can, where the circumstances warrant it, be obtained under Order 67, r. 6 (*Mander v. Fulcke*, 1892, 65 L. T. 454).

The rules of the Supreme Court contain no special provisions with regard to committal. With the exceptions mentioned above, the practice is the same as in the case of attachment.

Where available.—Committal is mentioned in only two of the rules of the Supreme Court:—

(1) A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by (*inter alia*) committal (Order 42, r. 7).

(2) An order for committal can be obtained against a sheriff who disobeys a notice to return a writ (Order 52, r. 11).

Apart, however, from the above cases, in which the contempt to be punished consists of a breach of an order of the Court in which the party prosecuting such order has a direct interest, the remedy by committal would seem to be the proper one where there has been a direct or special contempt of the Court.

"Direct contempt may be committed either by acts in the face of or within the precincts of the Court (*sedente curiâ*), or by acts done away from the Court" (Oswald on *Contempt*, p. 21). Contempts committed in the face of the Court are clearly punishable *instantly* by a summary order of committal. In other cases an application to the Court must be made on notice.

Special contempts are of various kinds. It is beyond the scope of this article to attempt any enumeration of the different cases in which a contempt of this nature can be committed (see Oswald on *Contempt*; and CONTEMPT OF COURT). Generally, it may be said that any conduct tending to pervert the course of justice (such as intimidation of witnesses, interference with the officers of the Court in discharge of their duties, comments on a pending cause, whether written or published, which are likely to prejudice any party to proceedings) amounts to contempt, punishable by committal. And in such cases the Court will, where the offence is proved, assert its authority, and make an order for committal against the guilty party. "The object of the discipline to be enforced by the Court in the case of a contempt of Court is not to vindicate the dignity of the Court or the person of the judge, but to prevent undue interference with the administration of justice" (*Helmors v. Smith*, 1886, 35 Ch. D. p. 455, per Bowen, L.J.).

The Court, however, discourages motions to commit, where merely a technical case is made, and only an apology and costs asked for (*Plating Co. v. Farquharson*, 1881, 17 Ch. D. 49; *Hunt v. Clarke*, *In re O'Malley*, 1889, 37 W. R. 724; *Metropolitan Music Hall Co. v. Lake*, 1889, 60 L. T. 749; *R. v. Payne*, [1896] 1 Q. B. 577; *In re Clements*, 1877, 46 L. J. Ch. 375).

Order.—An order for committal for contempt of Court must specify in what particular the party was guilty of contempt, so as to enable him to purge his contempt, and if the order does not contain the necessary particulars, it is bad for uncertainty (*R. v. Lambeth County Court Judge*, 1888, 36 W. R. 475).

[As to attachment and committal generally, see Anderson on *Execution*, pp. 68–156; *Annual Practice*, 1898; Chitty's *Arch.* pp. 941–954; Daniell's *Ch. Pr.* pp. 875–908; Edwards on *Execution*, pp. 229–267; Mather's *Compendium of Sheriff Law*; Oswald on *Contempt of Court*; Seton, pp. 381–392, 404–416; Dan. F. 393.]

Committal under Debtors Act, 1869, s. 5.—Under sec. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), power is given to any Court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt due from him in pursuance of any order or judgment of that or any other competent Court. The power given by the section is, in the case of any Court other than the High Court, subject to certain restrictions, the principal of

which are that proof of means is necessary before an order for committal can be made, and that payment may be ordered by instalments.

By sec. 103 (1) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and rules thereunder, the jurisdiction is now assigned to the judge of the High Court, to whom bankruptcy business is assigned. And cp. vol. iii. 545.

Appeal.—An appeal from an order of a judge at chambers respecting committal lies to the Court of Appeal, and not to a Divisional Court (*Genesc v. Lascelles*, 1884, 13 Q. B. D. 901).

Married Women.—No order for committal can be made against a married woman for non-payment of a judgment debt upon a judgment recovered against her, and payable out of her separate property, by virtue of the Married Women's Property Act, 1882 (*Scott v. Morley*, 1887, 20 Q. B. D. 120; and see *Draycott v. Harrison*, 1886, 17 Q. B. D. 147).

Payment by Instalments.—No order for payment by instalments can be made after a receiving order against the debtor (*In re Nuthall, Ford v. Nuthall*, 1891, 64 L. T. 241).

No order for committal can be made in respect of prospective default of instalments (*Stonor v. Fowle*, 1887, 13 App. Cas. 20).

Order Punitive in Character.—An order for committal is punitive in its nature, and not merely a means of enforcing payment of a debt. It is therefore not an "attachment for debt" within the meaning of sec. 14 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55) (*Mitchell v. Simpson*, 1890, 23 Q. B. D. 373; 25 Q. B. D. 183).

Irish Judgment.—There is no jurisdiction under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), to commit a judgment debtor upon the certificate of a judgment obtained in Ireland and registered in England; for committal under the Debtors Act is not a process of "execution," and the general words of sec. 1 of the Judgments Extension Act are controlled by sec. 4, and limited to "execution" under that Act (*In re Watson, Ex parte Johnson*, [1893] 1 Q. B. 21).

[See Vaughan Williams on *Bankruptcy*, pp. 629-633.]

C. EXECUTION AGAINST PARTICULAR PERSONS.

AGAINST MARRIED WOMEN.

The liability of married women in actions at law is dealt with under HUSBAND AND WIFE (*q.v.*), and in dealing with the various modes of execution it has been stated in what cases their interests can be reached by process of execution. It only remains to state the practice on issuing execution on a judgment or order against a married woman.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into operation on 1st January 1883, but in the absence of any directions to the contrary, the form of judgment against a married woman, and writs of execution under such judgment, remained unaltered until February 1884, when, in the case of *Perks v. Mylrea*, W. N. 1884, 64, Field, J., expressed his opinion that although it was right to sign judgment against a married woman in default or under Order 14, the execution on such a judgment should only issue against her separate estate. In *Bursill v. Tanner*, 1884, 13 Q. B. D. 691, it was held by Field and Manisty, JJ., that an order for judgment, and judgment against a married woman under the Act, should contain a further limitation restricting execution to "such separate estate as the defendant is not restrained from anticipating, unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself." This form of limitation was

used in executions until November 1887, when it was superseded by the form prescribed in *Scott v. Morley*, 1887, 20 Q. B. D. p. 132.

In *Robinson v. Lynes*, [1894] 2 Q. B. 577, it was held that where a married woman was sued upon a bill of exchange accepted by her before marriage, her personal liability upon the contract at common law was not taken away by the Married Women's Property Act, 1882, and that the plaintiff was in such a case entitled to a personal judgment against the married woman without the restriction prescribed in *Scott v. Morley*, *supra*.

The effect of these cases on the practice of issuing execution against married women is to render it necessary that every judgment or order against a married woman should contain the limitation clause, if such is applicable; for in the absence of such limitation in the judgment or order itself it would, on issuing execution, be presumed to be a personal judgment or order within the ruling in *Robinson v. Lynes*, *supra*, and execution would issue without limitation.

AGAINST PARTNERS.

Judgment against a Firm.—Where a writ is issued against a firm in the firm name, judgment cannot be entered against an individual partner. The action being against the firm, the judgment must also be against the firm (*Jackson v. Lichfield*, 1882, 8 Q. B. D. 474). The special provisions applicable to execution by writ against partners have no relation to an action against partners sued individually in their own names, even though they be described as "trading as —— & Co.," but only to actions against a firm in the firm name, under Order 48 A of the Rules of the Supreme Court, 1883.

When Available, and against Whom.—Order 48 A, r. 8, is as follows:—

Where a judgment or order is against a firm, execution may issue :

- (a) Against any property of the partnership within the jurisdiction ;
- (b) Against any person who has appeared in his own name under Rule (5) or (6), or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do ; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed may order that the liability of such persons be tried and determined in any manner in which any issue or question in an action may be tried and determined. But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ unless he has been made a party to the action under Order 11, or has been served within the jurisdiction after the writ in the action was issued.

(a) *Against Partnership Property.*—Under this rule execution on a judgment against the firm issues of course against the property of the partnership. The judgment must be against the firm in the firm name, otherwise no writ of execution can issue against the partnership property. See Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (1).

(b) and (c) *Against the Private Goods of a Partner.*—If a partner is personally served with the writ as a partner and fails to appear, execution issues against him as of course on proof of such service. And this includes a partner who, to the knowledge of the plaintiff, has left the business before action brought, provided he has been duly served (*Wigram v. Cox & Co.*, [1894]

1 Q. B. 792). If he has not been served he cannot be rendered liable by an order made under the latter part of the rule (S. C.). The service and default here spoken of mean personal service of the writ and default of the partner before judgment entered, and where the writ was first served on the person having the management of the business, and afterwards on a partner, it was held that judgment entered against the firm before the expiration of eight days from the second service was premature (*Alden v. Beckley & Co.*, 1890, 15 Q. B. D. 543). Notwithstanding *Ex parte Young*, 1881, 19 Ch. D. 124, and *Davis v. Morris*, 1883, 10 Q. B. D. 436, therefore, service of the writ and default prior to judgment are essential where there has been a dissolution of partnership to the knowledge of the plaintiff (*Wigram v. Cox*, *ubi supra*).

Under clause (b) of the above rule, execution on a judgment against a firm issues as of course against the private goods of any person who appears as, or admits on the pleadings that he is, or has been adjudged to be, a partner; and this applies to a married woman, for the mere fact that she is a partner is proof that she has separate estate (*Eddowes v. Argentine, etc., Co.*, 1890, 62 L. T. 602). But it is subject to the exceptions referred to *infra* as to an infant partner and a partner out of the jurisdiction, and an individual trading as a firm.

Order against a Person sought to be made Liable.—The application under the latter part of the above rule is made by summons to a master in chambers, and in case of dispute an issue will be ordered (see *Worcester Banking Co. v. Trotter*, 1887, 3 T. L. R. 708).

Infant Partner.—As regards personal execution, an infant partner is exempt, but seeing that he has no claim upon any of the assets of the partnership until after they have been applied in payment of the liabilities of the partnership, and these assets can be made available for the benefit of the creditors of the firm (*Lorrell v. Beauchamp*, [1894] A. C. 607), this exemption does not operate to exclude execution against partnership property.

Partner out of the Jurisdiction.—Under the concluding words of the above rule a partner is liable to personal execution on a judgment against the firm, if he was served with the writ either within the jurisdiction without order, or out of the jurisdiction by order, provided his liability as partner has been admitted or established by default, or otherwise under the rule. But if he was out of the jurisdiction when the writ was issued, and has not been served with the writ pursuant to order under Order 11, or subsequently came within the jurisdiction, and was served and made default prior to judgment, he is not liable to personal execution.

Individual Trading as a Firm.—An individual trading as a firm is not liable to personal execution under clause (c) of the above rule unless he has been personally served and has failed to appear. See *Annual Practice*, 1898, p. 870 (n), "Cases," etc.

Bankruptcy of one Partner.—Where the partnership goods of a firm were sold under an execution, and during the fourteen days for which the sheriff held the money in pursuance of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, notice of a receiving order against one of the partners was served on the sheriff, it was held that the bankruptcy of one of the partners did not interfere with the right of the execution creditor to the proceeds of his execution against the firm (*Dibb v. Brooke & Sons*, [1894] 2 Q. B. 338).

Charging Order on a Partner's Interest in the Firm.—The process of obtaining a charging order on a partner's share in the partnership property on a judgment against him individually was established by the Partnership

Act, 1890 (53 & 54 Vict. c. 39), s. 23. Prior to that Act a judgment against a partner could be executed against the property of the firm in which he was a partner. Sec. 23 of the Partnership Act abolishes that procedure, and in its place empowers the Court to make an order charging the partner's interest in partnership property. See Lindley on *Partnership*, 6th ed., 362.

Sec. 23 of the Partnership Act, 1890, is as follows:—

- (1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.
- (2) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a County Court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.
- (3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in the case of a sale being directed, to purchase the same.
- (4) This section shall apply in the case of a cost book company as if the company were a partnership within the meaning of this Act.
- (5) This section shall not apply to Scotland.

The summons spoken of in the above section is a judge's summons, and usually asks for a charge on the interest of the judgment debtor in the partnership property, and that some person named may be appointed receiver. Where there is reason to suppose that the debtor will deal with his interest in the property on being served with the summons, the practice is to apply *ex parte* for an injunction to restrain him from doing so pending the hearing of the summons. See *Annual Practice*, 1898, vol. i. p. 845.

Effect of Charging Order.—The effect of a charging order on a partner's interest in the firm is similar to that of a charging order on stocks and shares under the Judgments Act, 1838 (1 & 2 Vict. c. 110). See Lindley on *Partnership*, 6th ed., pp. 363–365; and see CHARGING ORDER, *supra*, and cases there collected. But sec. 23 of the Partnership Act, 1890, does not contain the proviso at the end of sec. 14 of the Judgments Act, 1838, to the effect that no proceedings shall be taken to enforce the charge for a period of six months from the date of the order, but on the contrary provides that by the same or a subsequent order a receiver may be appointed of the partner's share of the profits, declared or accruing.

Right of Copartners to Redeem the Interest Charged.—See *Helmore v. Smith*, 35 Ch. D. 436, and cases there cited, and Lindley on *Partnership*, 6th ed., p. 365.

AGAINST CORPORATIONS.

It is provided by Order 42, r. 31, of the Rules of the Supreme Court, that any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property.

There are various statutory provisions with regard to execution against corporations to which it is proposed briefly to refer.

Companies registered under the Companies Acts, 1862–1890.—By

sec. 85 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the Court may at any time after the presentation of a petition to wind up the company, and before the making of a winding-up order, restrain any action, suit, or proceeding against the company. By virtue of sec. 138 the above provision extends to the case of a voluntary winding-up. See also sec. 197 as to companies registered under Part VII. of the Act, and sec. 201 as to unregistered companies.

By virtue of sec. 24 (5) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), an application to stay proceedings is substituted for the application to restrain them (*In re Artistic Colour Printing Co.*, 1880, 14 Ch. D. 502).

After winding-up order any attachment, sequestration, distress, or execution put in force against the estate or effects of the company is absolutely void (s. 163).

An execution is not "put in force" until possession is taken (*In re London and Devon Biscuit Co.*, 1871, L. R. 12 Eq. 190; see Buckley, pp. 259-274, 430-432; Chadwyck-Healey, pp. 743-754).

Railway Companies.—By the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4, the rolling-stock of a railway company is protected from execution, but a person who has recovered judgment against the company may, on petition presented in the Chancery Division, obtain an order for appointment of a receiver and manager of the undertaking; and all money received by such receiver and manager is, after due provision for the working expenses of the railway, to be applied under the direction of the Court in payment of the debts of the company.

By sec. 5, where any property of the company has been taken in execution, any question whether or not it is liable to be so taken, notwithstanding the Act, may be determined in a summary way on an application by summons to the Court out of which the execution issued, or to a judge of any one of the superior Courts of law, if the execution issued out of one of such Courts.

As to the above sections, see *In re Manchester and Milford Ry. Co.*, 1880, 14 Ch. D. 645; *In re Cornwall Mineral Ry. Co.*, 1883, 48 L. T. 41; *Midland Waggon Co. v. Potteries and Shrewsbury Ry. Co.*, 1880, 6 Q. B. D. 36; *In re Birmingham and Lichfield Ry. Co.*, 1881, 18 Ch. D. 155; *Great Northern Ry. Co. v. Tichourdin*, 1883, 13 Q. B. D. 320; *In re Mersey Ry. Co.*, 1888, 37 Ch. D. 610; *In re East and West India Dock Co.*, 1888, 38 Ch. D. 576; *In re Hull, Barnsley and West Riding Ry. Co.*, 1887, 57 L. T. 82; *In re Eastern and Midlands Ry. Co.*, 1890, 45 Ch. D. 367.

The above provisions only protect the rolling-stock. The lands of a railway company are extendible under an *degit* (*In re Cambridge Ry. Co.*, 1868, L. R. 5 Eq. 413; *In re Bishops Waltham Ry. Co.*, 1866, L. R. 2 Ch. 382; *In re Hull, Barnsley and West Riding Junction Ry. Co.*, 1888, 40 Ch. D. 119).

By sec. 6 of the Railway Companies Act, 1867, a scheme of arrangement may be filed in the Chancery Division. On this being done, by sec. 9, no execution, attachment, or other process against the property of the company shall be available without leave of the Court, to be obtained on summons or motion in a summary way (see *In re Cambrian Ry. Co.*, 1868, L. R. 3 Ch. 278; *In re East and West India Dock Co.*, 1890, 44 Ch. D. 38; *In re Devon and Somerset Ry. Co.*, 1865, L. R. 6 Eq. 616).

Companies incorporated under the Companies Clauses Consolidation Act, 1845.—In the case of companies incorporated under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), it is provided by sec. 36, that if any execution shall have been issued against the property or effects of

the company, and there cannot be found sufficient whereon to levy such execution, then execution may be issued against any of the shareholders to the extent of their shares in the capital of the company not then paid up; but no such execution can issue without leave given by an order made upon motion in open Court.

By Order 42, r. 23, where a party is entitled to execution against any of the shareholders of a joint stock company, the party alleging himself to be so entitled may apply to the Court or a judge for leave to issue execution.

The words Court or a judge in the above rule modify the requirements of the section. For the application may be made in Chambers instead of by "motion in open Court."

The procedure prescribed by the rule takes the place of the old proceedings by *scire facias*.

Companies suing and sued in name of Public Officer.—Certain banking companies registered under the Country Bankers Act, 1826 (7 Geo. IV. c. 46), sue and are sued by a public officer (s. 9). By sec. 12, judgment recovered against the public officer is to have the like effect and operation upon and against the property of the company, and upon and against the property of every member thereof, as if it had been recovered against the company; and by sec. 13, execution may be issued against any member for the time being of the company; and if such execution shall be ineffectual, then, by leave of the Court, against any person or persons who was or were a member or members when the contract or engagement on which the judgment may have been obtained was entered into, or became a member at any time before such contract was executed, or was a member at the time of judgment obtained.

Order 42, r. 23, expressly applies to the case of a judgment against a public officer or other person representing a company. The provisions of the rule therefore govern the case of a person desirous of applying the provisions of the Act against a member of the company.

Companies established by Letters-Patent.—Companies established by letters-patent under 7 Will. IV. and 1 Vict. c. 73 may sue and be sued by a public officer (s. 3). All judgments, etc., obtained against such public officer shall have the same effect against the property and effects of the company, and also, to the extent of their liability as defined by the Act, against the persons, property, and effects of the individual existing or former members thereof as if such judgment had been obtained against the company, and execution shall be issued thereon accordingly.

The provisions of Order 42, r. 23, apply where it is desired to issue execution against individual members of the company.

[See Chitty's *Arch.* pp. 1049-1091; Anderson on *Execution*, pp. 569-580.]

D. DISCOVERY IN AID OF EXECUTION.

Generally.—In order to assist garnishee proceedings it was provided by sec. 60 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), that a judgment creditor might apply for a rule that his judgment debtor should be orally examined "as to any and what debts were owing to him." This provision is reproduced in Order 42, r. 32, and is thereby extended so as to operate in aid of execution generally on orders as well as judgments. The former enactment, moreover, applied only to individuals, not corporations (*Dickson v. Neath and Brecon Rwy.*, 1869, L. R. 4 Ex. 87), and only to debts owing. Both these defects are supplied by Order 42, r. 32, which specifically includes a corporation and provides for the examination of "any officer thereof," and further extends the scope of the examination.

to "what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order."

Against whom Order obtainable.—The term "debtor" includes any person against whom a judgment or order is made for the recovery or payment of money or costs (Order 42, r. 32), and any party liable under a judgment or order other than for the payment of money (Order 42, r. 33). A married woman having separate estate is within the rule (*Aylesford v. G. W. R. Co.*, [1892] 2 Q. B. 626), and also a garnishee against whom an order absolute has been made under Order 45 (*Cowan v. Carlill*, 1885, 33 W. R. 583). There is no power to order the examination of any person other than the debtor, or, in the case of a corporation, other than an officer thereof (*Irwell v. Eden*, 1887, 18 Q. B. D. 588).

How obtained.—An order for examination of a judgment debtor as to means is obtained on summons to a master, which should be served at the address for service if he has appeared (Order 67, r. 2), or filed in default against him if he has failed to appear (Order 67, r. 4).

Service of Order.—The order for examination, after having been drawn up, must be taken to a master for an appointment to be made, and served personally on the debtor with an indorsement of the appointment, and at the same time the party prosecuting the order must tender to the debtor sufficient conduct money to enable him to attend the place of examination (*Protector Endowment Co. v. Whittam*, 1877, 36 L. T. 467). But he is not entitled to witness's expenses, but only to conduct money, as to the sufficiency of which the master is the proper judge (*Rendell v. Grundy*, 1895, 1 Q. B. 16). It was decided in a County Court case that if the debtor resided in the town where the Court was held he was not entitled to conduct money (*Wilts and Dorset Banking Co. v. Locke*, 1894, 97 L. T. Jo. 15).

Disobedience of the Order.—A debtor failing to attend and be examined in pursuance of the order served on him is liable to attachment (cp. *Protector Endowment Co. v. Whittam*, 1877, 36 L. T. 467) on proof of due service and of sufficient conduct money having been tendered. It is usual, however, to require the plaintiff to obtain a second appointment, and to again serve the debtor with notice thereof.

An examination under Order 42, r. 32, includes cross-examination of the severest kind, and the debtor is bound to answer all necessary questions properly asked, with a view of ascertaining what debts are owing to him, and from whom they are due (*Republic of Costa Rica v. Strousberg*, 1880, 16 Ch. D. 12), and whether he has any, and what other, means of satisfying the order (Order 42, r. 32). If the debtor refuses to answer questions which the master considers ought to be answered, the judgment creditor should apply for an order that the debtor do answer the questions, and in case of his disobedience should proceed to attachment.

Discovery in aid of Judgments other than Money Judgments.—Order 42, r. 33, provides that in the case of any judgment or order other than for the recovery or payment of money, if any difficulty should arise in executing it, the party interested may apply to the Court or a judge, "and the Court or judge may make such order thereon for the attendance and examination of any party or otherwise as may be just."

E. STAY OF EXECUTION.

Provision of Rules of Supreme Court.—By Order 42, r. 17 (b), it is provided that the Court or a judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

R. 27 provides as follows :—

No proceedings by *audita querela* shall hereafter be used, and any party against whom judgment has been given may apply to the Court or a judge for a stay of execution, or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded, and the Court or judge may give such relief and upon such terms as may be just.

"The process known as *audita querela* was an action (called an equitable action) which lay for a person who was in execution, or in danger of being so, when he had matter to show that execution should not have issued or should not issue against him" (Edwards on *Execution*, p. 40).

Whether the Court will order a stay of execution in any particular case must depend upon the special circumstances. The discretion is a judicial one to be judicially exercised. Special circumstances must always be shown to induce the Court to grant a stay of execution (*The Annot Lyle*, 1886, 11 P. D. 114; *Bradford v. Young*, 1884, 28 Ch. D. 18; *Barker v. Lavery*, 1885, 14 Q. B. D. 769).

Bankruptcy of Judgment Debtor.—Under sec. 10 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the Court may at any time after the presentation of a bankruptcy petition stay any execution against the property or person of the debtor.

Winding-up of Company.—Sec. 85 of the Companies Act, 1862 (25 & 26 Vict. c. 89), gives the Court power to stay further proceedings in an action against the company after presentation of a petition to wind up; sec. 87 provides that no proceedings shall, after winding-up order, be continued or commenced without leave; whilst sec. 163 makes any execution put in force after the commencement of the winding up absolutely void.

Stay pending Appeal.—The most usual ground for stay of execution is that an appeal is pending. The appeal itself does not operate as a stay (Order 58, r. 16). An application to stay pending appeal should be made in the first instance to the Court below (Order 58, r. 17). After application to the Court below, an application to the Court of Appeal may be made, which will be treated as an original application (*Cropper v. Smith*, 1883, 24 Ch. D. 305). There is an absolute discretion in the Court to grant or refuse a stay (*Attorney-General v. Emerson*, 1889, 24 Q. B. D. 56). As to the terms in which an order will be made, the following cases may be consulted: *Merry v. Nickalls*, 1873, L. R. 8 Ch. 205; *Morgan v. Elford*, 1877, 4 Ch. D. 352; *Bradford v. Young*, 1884, 28 Ch. D. 18; *The Annot Lyle*, 1886, 11 P. D. 114; *Barker v. Lavery*, 1885, 14 Q. B. D. 769).

Where an action has been altogether dismissed there is no jurisdiction to stay proceedings pending an appeal, but the Court of Appeal will in a proper case grant an injunction to restrain the parties parting with property until the hearing of the appeal (*Wilson v. Church*, 1879, 11 Ch. D. 576; see, however, *Otto v. Lindford*, 1881, 18 Ch. D. 394).

Stay pending Motion for New Trial.—Pending a motion for a new trial the Court of Appeal will not, except under special circumstances, stay execution (*Monk v. Bartram*, [1891] 1 Q. B. 346).

Stay pending Appeal to House of Lords.—Application in such case must always be to the Court of Appeal (*The Khedive*, 1879, 5 P. D. 1; *Hamill v. Lilley*, 1887, 19 Q. B. D. 83). As to circumstances which will induce the Court to order a stay, see *Wilson v. Church*, 1879, 12 Ch. D. 454; *The Ratata*, [1897] P. 118).

[As to Stay of Execution, see Chitty's *Arch.* pp. 790–792; Anderson on *Execution*, pp. 4–8; Edwards on *Execution*, pp. 39–43.]

[See further, ATTACHMENT; ATTACHMENT OF DEBTS; CHARGING ORDER;

CONTEMPT OF COURT; COUNTY COURTS; DEBTORS ACT; EXTENT; HUSBAND AND WIFE; INFERIOR COURTS; INTERPLEADER; JUDGMENT; RECEIVER; SHERIFF; STAY OF EXECUTION; INJUNCTION.]

[*Authorities*.—Anderson on *Execution*, 1889; *Annual Practice*, 1898; Bacon's *Abridgment of the Law*, 7th ed., 1832; Buckley on the *Companies Acts*, 7th ed., 1897; Cabalé on *Attachment of Debts and Equitable Execution*, 2nd ed., 1888; Chitty's *Archbold's Practice*, 14th ed., 1885; Chitty's *Forms*, 12th ed., 1883; Daniell's *Chancery Practice*, 6th ed., 1882-84; Daniell's *Forms and Precedents*, 4th ed., 1885; Dart's *Vendors and Purchasers*, 6th ed., 1888; Day's *Common Law Procedure Acts*, 4th ed., 1872; Edwards on the *Law of Execution*, 1888; Gilbert on the *Law of Execution*, 1763; Healey's *Company Law and Practice*, 3rd ed., 1894; Kerr on *Receivers*, 2nd ed., 1882; Lindley on *Partnership*, 6th ed., 1893; Mather's *Compendium of Sheriff Law*, 1894; Oswald on *Contempt of Court*, 1892; Robbins on the *Law of Mortgages*, 1897; *Ruling Cases*, vols. x., xi., 1896, 1897; Seton's *Judgments and Orders*, 5th ed., 1891-93; Shelford's *Real Property Statutes*, 9th ed., 1893; Smith's *Leading Cases*, 10th ed., 1896; Tidd's *Practice of the Court of King's Bench*, 1828; Vaughan Williams on *Law and Practice in Bankruptcy*, 6th ed., 1894; White and Tudor's *Leading Cases in Equity*, 7th ed., 1897.]

Execution—

Of Criminals.—See CAPITAL FELONIES; CAPITAL PUNISHMENT.

Of Deeds.—See DEED.

Of Powers.—See POWERS.

Of Statutory Powers.—The term "execution" in this connection means execution with proper care and skill (*Clothier v. Webster*, 1862, 12 C. B. N. S. 790).

Of Wills.—See ATTESTATION; WILLS.

Executive Government.—There is no sharp separation of legislative, executive, and judicial powers in the structure of our constitution such as is to be seen in foreign systems framed under the influence of Montesquieu's famous theory, although this theory was itself largely inspired by the study of English institutions. Historically, all these powers emanate from the Crown, and though now in great measure separated still retain traces of their common origin. Our supreme Legislature is the Crown in Parliament. The administration of justice, though delegated to the judges, is carried on in the name of the Sovereign. Executive authority still remains vested in the Crown, but subject to well-defined limitations both of law and custom. This executive authority of the Crown may be defined for convenience as including all those acts of government which the Crown can lawfully do or authorise to be done without obtaining the concurrence of the two Houses in an Act of Parliament, though some of them in strictness belong rather to the sphere of subordinate legislation than of executive action. These discretionary powers, as they have been styled, of the Crown and its advisers, are in part derived from the common law and in part statutory. In so far as these are derived from the common law, they are part of the royal PREROGATIVE, and will be severally dealt with under that heading. Whether common law or statutory, they are all alike liable to be modified by statute, and to be restrained within legal limits by the Courts. In France and some other Continental nations the

theory of the separation of powers has been held to require that the acts of the executive Government should not be open to question in the ordinary Courts. Since the French Revolution special administrative tribunals containing a large official element have been constituted to deal with such questions, and a special body of *droit administratif* has been developed to apply to them. In England, and also in the United States, the ordinary Courts are competent to try such cases according to the ordinary rules of law, though something corresponding to *droit administratif* may be found in certain rules of exception, such as the old prerogative maxim *nullum tempus occurrit regi*, the protection of the executive from vexatious questioning in the exercise of official duty, etc. It may also be noticed that the English executive has no power of suspending the ordinary safeguards of law by proclaiming martial law (*q.v.*) or a state of siege, such as is provided by some foreign constitutions.

The Crown as the Executive.—The executive authority of the Crown must not only be kept within legal bounds, but must also be exercised in the forms prescribed by the laws and customs of the realm. Some things must be done by Order in Council, others under the Great Seal in the custody of the Chancellor, others under the sign manual of the Sovereign countersigned by the Secretary of State. The Sovereign cannot now do any executive act, except dismissing a minister or proroguing or dissolving Parliament in person, without the intervention of some minister who may be held responsible for illegality or abuse. In the time of Elizabeth the judges resolved that the Queen's warrant by word of mouth or under the signet was not sufficient authority to issue her treasure, but that it must be under the Great or Privy Seal (*Mildmay's case*, 11 Co. Rep. 91 *a*); and in modern times, when George IV. found a difficulty in affixing the sign manual, it was thought necessary to obtain an Act of Parliament to dispense with this formality. Still more recently another Act of Parliament was required to relieve the Queen from the necessity of signing every commission in the army.

The constitutional rule that the Crown should act through, and on the advice of, ministers responsible to Parliament (see below) does not impair the right of the Sovereign to the fullest information, and the exercise of a legitimate influence. This subject has been already discussed under CABINET, where the control exercised by the Cabinet in executive matters is also dealt with. Many executive acts in which the Sovereign does not personally intervene are none the less in law acts of the Crown though performed by ministers (Lord Campbell in *Harrison v. Bush*, 1855, 5 EL. & BL. 344). A minister of the Crown may, however, be constituted a corporation sole for some purposes by statute, and so acquire rights and liabilities not incident to his character as a minister of the Crown (*Hawley v. Steele*, 1877, 6 Ch. D. 521). So the Secretary of State for India in Council is a corporation, and liable to be sued in certain cases.

The Executive and the Courts.—The leading rule of law is the personal immunity of the Sovereign expressed in the legal maxim that the king can do no wrong. No criminal proceeding or civil action will lie against the Crown. A remedy known as a PETITION OF RIGHT (*q.v.*) is indeed available if the Crown or its servants detain the lands or goods of the subject, and to obtain damages for breach of contract (*Thomas v. R.*, 1875, L. R. 10 Q. B. 31), but no petition of right will lie for a tort (*Canterbury v. R.*, 1842, 4 St. Tri. N. S. 767). The maxim that the king can do no wrong does not protect ministers of the Crown, for it has also been interpreted to mean that the order of the Crown will not justify an illegal act on

the part of its servants. "As the Sovereign cannot authorise wrong to be done, the authority of the Sovereign would afford no defence to an action brought for an illegal act committed by an officer of the Crown" (Cockburn, C.J., in *Feather v. R.*, 1865, 6 B. & S. 257). No action, however, will lie against a minister of the Crown in his character as minister; if he commit a trespass in regard to the person or property of another, he may be sued as a private person (*Raleigh v. Goschen*, 1897, 14 T. L. R. 36; and see ACT OF STATE). So an injunction might be granted to restrain an officer of the Crown from committing a trespass, but it would be granted against him as a private individual and not as an officer of the Crown (*ibid.*).

It is, however, possible that officers of the Crown, such as colonial governors, and naval and military officers called upon to act in circumstances of difficulty, might not be held liable for overstepping the strict bounds of their authority, and they would at least be entitled to an act of indemnity (see *Forbes v. Cochrane*, 1824, 2 St. Tri. N. S. 147; *Philipps v. Eyre*, 1866; *Keighly v. Bell*, 1866, 4 F. & F. 790; *Grant v. Secretary of State for India*, 1877, 2 C. P. D. 445).

In trespass, it would appear that an action may be maintained, not only against the subordinate actually committing the trespass, but also against the superior officer who gave the order (*Cobbett v. Grey*, 1849, 4 Ex. Rep. 729; *Raleigh v. Goschen*, *ubi supra*). On the other hand, an official superior is not responsible for the negligence of a subordinate, even when appointed by himself (*Lane v. Cotton*, 1701, 1 Raym. (Ld.), 646; *Nicholson v. Mouncey*, 1812, 15 East, 384; *Canterbury v. R.*, 1842, 4 St. Tri. N. S. 767).

No action will lie in respect of acts done in the course of official duty. In actions for libel it has been expressly decided, on grounds of public policy, that all statements made in the course of official duty are absolutely privileged, and that the privilege is not ousted by alleging malice (see ABSOLUTE PRIVILEGE), and the same principle would appear to apply where official acts are questioned in other forms of action (*Sutton v. Johnstone*, 1786, 1 T. R. 493, 1 R. R. 257); see, however, the cases in which the malicious abuse of naval or military authority has been held actionable.

On the general principles of agency, and also on grounds of public policy, the officers of the Crown are not liable on contracts entered into on behalf of the Crown (*Macbeath v. Haldimand*, 1786, 1 T. R. 172; *Gidley v. Lord Palmerston*, 1822, 2 St. Tri. N. S. 1263; *Grant v. Secretary of State for India in Council*, 1877, 2 C. P. D. 445; *Palmer v. Hutchinson*, 1885, 6 App. Cas. 619; *Dunn v. Macdonald*, [1897] 1 Q. B. 555).

No *mandamus* will be directed to the Crown, or "to any servant of the Crown simply acting in his capacity of servant," to enforce the performance of a duty owed to the Crown, even if one of the public is damnified by his refusal to act. In such cases redress must be sought not in the Courts but in Parliament. On the other hand, a *mandamus* will be granted against officers of the Crown where a duty to the public is imposed on them. It has now been decided, after some conflict of cases, that no *mandamus* will go against the Lords of the Treasury to compel them to apply public money to the purposes for which it has been appropriated by Parliament, on the ground that their duty under the statute is to the Crown, and not to the public (*R. v. Lords Commissioners of the Treasury*, 1872, L. R. 7 Q. B. 387). As to the distinction, see further *In re Nathan*, 1884, 12 Q. B. D.; *R. v. Commissioners of Income Tax*, 1888, 21 Q. B. D. 313; *R. v. Secretary of State for War*, [1891] 2 Q. B. 326.

The Executive and Parliament.—Although by law the executive power is vested in the Crown, yet we are rightly said to have a parliamentary

executive in England, because by the custom of the constitution, the ministers of the Crown are nominated by the Prime Minister from the members of the Legislature, and depend for their continuance in office upon retaining the confidence of the House of Commons. The United States constitution, following the strict theory of the separation of powers, has made the President's ministers independent of Congress, that is to say, only removeable by impeachment. The French executive closely follows the English model, but it has recently been contended that the written constitution requires the ministry to possess the confidence of the Senate as well as of the Assembly. Parliamentary supervision over the conduct of the executive is largely exercised by putting questions to the ministers representing the different departments; and in case of an unsatisfactory answer, by moving the adjournment of the House, or a reduction of the minister's salary in Committee of Supply, or a formal vote of censure. Either House may also appoint committees of inquiry, and embody its views in resolutions; and lastly, there is the now disused weapon of impeachment. As to the restrictions under which these great powers should be exercised, see CABINET; and Todd, *Parliamentary Government in England*, ed. Walpole, vol. ii. p. 164.

Executive Judgment is a term not of English, but of Continental law. In *Nouvion v. Freeman*, 1889, 15 App. Cas. 1, which was an action on a Spanish judgment which was described as "*rematé*" or "executive" as distinct from "plenary," and was held by the House of Lords not to be a final and conclusive judgment upon which an action could be brought in an English Court. See FOREIGN JUDGMENTS.

Executors and Administrators.

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Origin of Executor and Administrator.—An executor, according to modern usage of the term, is the person to whom the execution of a will of personal estate is by the testator's appointment confided. In the language of the canonists, such an executor was termed "*executor testamentarius*," the administrator of an intestate being distinguished as "*executor dativus*," and the ordinary of the diocese as "*executor a lege constitutus*."

The office, if not the style, of executor was long known in England. He was originally a trustee, the confessor or some friend of the dying man, to whom he made over part of his property for the purpose of carrying out his last wishes; and in very early times the Church asserted a right to apply or superintend the application of legacies in *pious usus*, and compelled the executor, as trustee, to carry out the wishes of the deceased, and to obtain payment of the legacies by the *hæres*. Gradually the executor became the "personal representative" of the testator. One of the earliest wills with executors is that of Henry II., in which, however, the term itself is not used, but Glanvill (vii. 6) uses the terms *testamentum* and *executor*. In the thirteenth century it was settled law that the executor should prove the will in the Court of the judge ordinary, generally the bishop of the diocese, where he was sworn to duly administer and account. In this century it seems that by the general law a testator leaving neither widow nor child could dispose of all his moveable goods, but not more than one half if he left a widow only, or a child or children only, the other half going to the widow or issue, and not more than one third if he left widow and child or children, one other third going to the widow, and the remaining third to the issue. In the seventeenth century this rule of alienation prevailed in the province of York, the city of London, and perhaps in some other towns, but in the province of Canterbury the testator had a general power of disposition. Ultimately the old common law rule was abolished, and now by the Wills Act, 1 Vict. c. 26, every person of full age is empowered to bequeath by his will, executed as required by the Act, all personal estate (see interpretation clause, s. 1) to which he shall be entitled either at law or in equity at the time of his death. By the Court of Probate Act, 1857, 20 & 21 Vict. c. 77, amended by 21 & 22 Vict. c. 95, the jurisdiction of the Ecclesiastical Courts over wills was abolished, and all wills were required to be proved in the Court of Probate, now by the Judicature Act, 1873, merged in the High Court of Justice (see s. 16 (6)), and represented by the Probate, Divorce, and Admiralty Division of that Court (see s. 34).

In early times to die intestate was equivalent to dying unconfessed, and in order to afford such remedy as was possible, the Church asserted a right to superintend the distribution of the intestate's goods. Bracton (f. 60 *b*) states that the administration of the deceased's goods belongs to his friends and to the Church. In the thirteenth century it was settled law that the ordinary could dispose of an intestate's goods in *pious usus*, after deducting the *partes rationabiles* of the widow and children (if any), but without making any provision for the intestate's debts. However, in 1285, by the

Statute of Westminster 2, c. 19, it was declared that the ordinary should be bound to pay the intestate's debts in like manner as an executor, but the residue was still left in the ordinary's hands, until in 1357 the Statute 31 Edw. III. stat. 1, c. 11, provided that the ordinary should commit the administration of the intestate's goods to his next and most lawful friends, and gave actions of debt to and against these administrators. This statute introduced "administrator" as a technical term; in the works of the canonists (as already mentioned) an administrator is termed "*executor dativus*." Under the statute the administrator's authority was derived from the ecclesiastical judge by a grant denominated "letters of administration." The jurisdiction of the Ecclesiastical Courts was abolished in this respect also by the Court of Probate Act, 1857, and administration was thenceforward granted by the Court of Probate, the intestate's personal estate vesting in the judge of that Court until the grant, as formerly in the ordinary. By the Judicature Act, 1873, the jurisdiction of the Court of Probate was, as already mentioned, transferred to the High Court of Justice, and assigned to the Probate, Divorce, and Admiralty Division of that Court.

Wills.—As to the making, revocation, and republication of wills, and the capacity to make a will, and the wills of married women and soldiers and seamen, see ATTESTATION; HUSBAND AND WIFE; WILL; WOMEN.

Who can be Executor.—Generally any person capable of making a will can be made an executor. A corporation sole or aggregate can be an executor, and in the latter case administration with the will annexed will be granted to the corporation's nominee (*In the goods of Hunt*, [1896] Prob. 288; but see *Law, Guarantee, and Trust Society v. Governor and Company of Bank of England*, 1890, 24 Q. B. D. 406); the appointment of a partnership firm is the appointment of the individuals composing it. An alien can be an executor (see the Naturalisation Act, 1870, 33 & 34 Vict. c. 14, s. 2). An infant may be appointed, but cannot act during minority, and, if sole executor, administration *cum testamento annexo* will be granted to the infant's guardian, or as the Court thinks fit (see 38 Geo. III. c. 87, s. 6; before this Act an infant could act at the age of seventeen years). If the infant is one of several executors, those who are of full age can act, and no grant of administration is required. In case of the poverty or insolvency of the person appointed, the Court of Chancery could control him by appointing a receiver. Idiots and lunatics are not capable of being executors. Formerly a married woman could not accept the office of executrix or administratrix without her husband's consent; the husband was entitled to administer the estate vested in his wife as such, and she could do nothing therein to his prejudice, and without him she could not sue or be sued. Now, however, under the Married Women's Property Act, 1882, a married woman who is an executrix or administratrix, alone or jointly, may sue or be sued without her husband as if she were a *feme sole* (see ss. 18, 1), and her husband is not subject to any liability for a *devastavit* committed by her unless he has intermeddled in the administration (see s. 24). The husband need not join in the administration bond on the grant of administration to the wife (*In re Ayres*, 1883, 8 P. D. 168).

Appointment of Executors.—A testator may appoint a sole executor or several. An appointment of several with power to the survivor to appoint a new executor is good. The executor derives his office from a testamentary appointment only; if not expressly appointed he may be by implication, "according to the tenor," as where a person is to have the testator's goods to pay debts, or one is appointed executor if another will

not. Where a testatrix appointed two persons "trustees" of her will, and expressed her wish that they should pay her funeral and other debts, it was held^{*} that they were thereby constituted executors according to the tenor (*In the goods of Wilkinson*, [1892] Prob. 227). There is a distinction between executors and overseers or coadjutors, who have no power to do more than overlook, and, if occasion arise, complain to the Court. An executor may be appointed in substitution for one who cannot or will not act, but such appointment, in the absence of express provision to the contrary, will not operate on the death of the original executor after acceptance of office. The appointment of an executor may be limited as to time (e.g. during a term of years, or a minority, or upon attaining full age), or as to place, or as to different parts of the property; but as regards creditors they are all executors as one executor, and may be sued as one (*Rose v. Bartlett*, 1632, Cro. (3) 293). The appointment may also be conditional, and on condition precedent or subsequent, as upon giving security, or proving the will within a specified time.

Chain of Representation.—If a sole executor, or the survivor of several executors, dies before the estate has been completely administered, his executor will be the legal personal representative of the original testator, and so on, as long as the chain is unbroken by an intestacy; for an administrator of an executor is not the representative of the testator. But an administrator *durante minore etate* of the executor of an executor is the representative of the first testator. Where a person appointed executor renounces probate, the representation goes as if he had never been appointed (Court of Probate Act, 1857, s. 79). The executor of a married woman executrix represented the testator, even before the Married Women's Property Act, 1882.

Executor de son tort.—One who, not being executor or administrator, intermeddles with the deceased's goods, or performs any act pertaining to an executor, is called in law an executor *de son tort*, i.e. of his own wrong. Examples of acts constituting an executor *de son tort* are: Demanding or receiving payment of debts due to the deceased, paying deceased's debts out of the assets, acting as administrator in fraud of creditors (see 43 Eliz. c. 8), entry upon land leased to the deceased, under claim of the particular term; but otherwise, if the entry is general. It seems that there cannot be a lawful executor and an executor *de son tort* at the same time (see *Hall v. Elliot*, 1791, 1 Peake N. P. 119). Acts which do not constitute an executor *de son tort* are: Putting the deceased's goods in security, directing the funeral and paying the expenses out of the assets, making an inventory of deceased's goods, or providing necessaries for his family, receiving assets as agent for the lawful executor. The acts must be such as an executor or administrator could have done (*Peters v. Leader*, 1878, 47 L. J. Q. B. 573-4). Where an English company registered the executors in America of a testator domiciled there as owners of shares in his place, although they had not obtained, and did not intend to obtain probate in England, as the company knew, it was held that the company had not so intermeddled with the estate as to become an executor *de son tort* (*A.-G. v. New York Breweries Co.*, [1897] 1 Q. B. 738). This decision was, however, reversed by the Court of Appeal (*W. N.* [97] 175). An executor *de son tort* is liable to be sued as executor by a creditor or legatee, as well as by the lawful executor or administrator. He has all the liabilities, but none of the privileges, of a lawful executor. He can, however, plead *plene administravit* in a creditor's action, and will not be charged beyond the assets come to his hands, but he cannot plead a retainer of his own debt, unless he afterwards obtain administration. All

acts which he does are good, if they are lawful, and such as the rightful executor would have been bound to do, as a payment by him as executor to a creditor, who may reasonably suppose he has authority to act as such (see *Thomson v. Harding*, 1853, 2 El. & Bl. 630; *Mountford v. Gibson*, 1804 4 East, 441; 7 R. R. 599). An executor *de son tort* cannot bring any action in right of the deceased; but, being in possession of the deceased's effects, he can maintain an action for taking them away or injuring them against a mere wrong-doer.

Renunciation of Probate.—A person named executor may accept or refuse the office at his discretion. He may, within such time as the Court thinks proper, be cited to elect; if he does not appear, he will be treated as having renounced (see 21 & 22 Vict. c. 95, s. 16). If he administers without obtaining probate within six months of the testator's death, or two months after the termination of a suit or dispute respecting the will which extends beyond four months from the death, he will be liable to a penalty of double the amount of duty chargeable, as a debt to the Crown (44 Vict. c. 12, s. 40, amending 55 Geo. III. c. 184, s. 37; see *A.-G. v. New York Breweries Co.*, [1897] 1 Q. B. 738). The executor of an executor who has accepted the executorship of the latter testator, cannot renounce the executorship of the former (*Brooke v. Haymes*, 1868, L. R. 6 Eq. 25). If the executor once administers, he may be compelled to prove the will. Acts which show an intention to assume the office, or which would render him liable as an executor *de son tort* (see that heading), will amount to an administration. A renunciation must be by some act recorded; it need not be under seal. Until it has been recorded, it can be withdrawn, and no person can meanwhile take administration. The renunciation cannot be as to part only. The rights of a person who renounces probate wholly cease, and the representation of the testator devolves as if he had not been appointed executor (20 & 21 Vict. c. 77, s. 79). An executor will not be allowed to retract his renunciation, unless on good grounds (*In the goods of Gill*, 1873, L. R. 3 P. & D. 113; and see *In the goods of Bell*, 1879, L. R. Ir. 3 Ch. D. 230; *In the goods of Stiles*, 1897, W. N. 163 (7)). It appears to be doubtful whether executors who renounce can exercise a power expressly given to executors (see Williams, *Executors*, 9th ed., vol. i. p. 234; Farwell, *Powers*, 2nd ed., p. 95; Sugden, *Powers*, 6th ed., p. 138; 2 Preston, *Abstracts*, 264). It has, however, been held that a renouncing executor cannot act in the exercise of a power of selecting charities and distributing the residue among them, and that the power was given to the executors as such, and that two who had proved could exercise it alone (*Cravford v. Forshaw*, [1891] 2 Ch. 261).

Probate.—The will must be proved in the Probate, Divorce, and Admiralty Division of the High Court, to which are assigned all causes and matters which would have been within the exclusive cognisance of the Court of Probate before the Judicature Act, 1873 (see s. 34, and *Priestman v. Thomas*, 1884, 9 P. D. 70, 210). An executor derives his title from the will, and not the probate, but the probate is the only proper evidence of the executor's appointment. As to the jurisdiction of the Probate Division and of County Courts, and the mode of proving wills, see Williams, *Executors*, 9th ed., pp. 243 *seq.*, 258 *seq.*, and see COUNTY COURT AND PROBATE. Under the Land Transfer Act, 1897, probate may be granted in respect of real estate only, although there is no personal estate (see s. 1 (3)).

Acts before Probate.—The executor's title is derived from the will, but the only legal evidence of the will is the probate, or letters of administration *cum testamento annexo*, when such are granted. The probate relates

to the time of the testator's death, and the executor may, before probate, perform all ordinary acts of administration, such as paying or receiving debts, or assenting to a specific legacy, or assigning a term of years or other chattel of the testator; but a purchaser from the executor is not bound to pay over the purchase money until probate. The executor may also commence (though he cannot in general maintain) any action before probate, provided he obtains probate before it is necessary to give it in evidence; and he can present a bankruptcy petition as creditor, but cannot obtain a receiving order until probate has been granted (*Rogers v. James*, 1816, 7 Taun. 147); and similarly, he can present a winding-up petition, but must obtain probate before the hearing (*In re Masonic and General Life Assurance Co.*, 1885, 32 Ch. D. 373). He may also be sued before probate, if he has elected to administer. If he dies before probate, his executor cannot prove the first will, but administration with that will annexed must be obtained. As to the penalty for administering without obtaining probate, see *ante*, *Renunciation of Probate*.

Acts before Grant of Administration.—An administrator derives his title from the Court, and therefore, as a rule, he cannot act before the grant of letters to him; and the grant will not relate to the intestate's death, except where the act is for the benefit of the estate. He could not commence an action at law before the grant, though he might file a bill in Chancery, alleging that it had been made, and producing the letters of administration at the hearing. He cannot assign or surrender a term of years before the grant. The Land Transfer Act, 1897, provides that all enactments and rules of law as respects the dealing with chattels real before probate or administration, are to apply to real estate so far as the same are applicable, as if it were a chattel real vesting in the personal representatives, except that some or one only of several representatives cannot, without the authority of the Court, sell or transfer real estate (see s. 2 (2)).

Grant of Administration.—The persons to whom administration was to be granted in case of intestacy were pointed out by the Statutes 31 Edw. III. stat. 1, c. 11, and 21 Hen. VIII. c. 5, s. 3. The husband has exclusive right to be his wife's administrator, and the Married Women's Property Act, 1882, has not altered the devolution of her undisposed of separate personalty (*In re Lambert's Estate*, 1888, 39 Ch. D. 626); but not after a protection order (under 20 & 21 Vict. c. 85, s. 21). His right does not vest in the trustee under his bankruptcy (*In the goods of Turner*, 1886, 12 P. D. 18). If the husband die before the grant, it will be made to his representative, unless the wife's next-of-kin are entitled to the beneficial interest. Where the wife was executrix, administration *de bonis non* of her testator will not, in general, be granted to her husband. The widow is usually preferred to the next-of-kin, but the Court has a discretion. As to who are the next-of-kin entitled to administration, and the mode of calculating degrees of consanguinity, see Williams, *Executors*, 9th ed., pp. 355 *seq.*, and DISTRIBUTIONS, STATUTE OF. The right to administration follows the right to the property (*In the goods of Gill*, 1828, 1 Hag. Ec. 342), and it will suffice to state here that the order is: children and their lineal descendants; if none, the deceased's parents; brothers and sisters; grand-parents; uncles or nephews; great grand-parents; and, lastly, cousins (2 Steph. Com., 11th ed., 208). The half blood is admitted to the administration as well as the whole, but the whole blood is preferred.* Where there are several next-of-kin in equal degree, the Court can elect one or more for the grant, and will prefer a son to a daughter, and an elder to a younger brother. The Court prefers a sole to a joint administration. The consuls of foreign States may, in certain cases,

administer the personal property of subjects of such States dying here, in the absence of any person rightfully entitled (see 24 & 25 Vict. c. 121, s. 4). The right of succession to the personal estate of an intestate is regulated by the law of his domicile, but the administration must be in the country where possession is taken and held under lawful authority (and see *Ewing v. Orr-Ewing*, 1885, 10 App. Cas. 453). The Crown is entitled to administer to a bastard, and his widow (if any) will be entitled to one moiety only, except in cases coming within the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29). If the next-of-kin will not take out administration, a creditor may do so, citing the next-of-kin, even though the debt be statute-barred, but he must enter into a bond for rateable division among the creditors (*In the goods of Brackenbury*, 1877, 2 P. D. 272); and for want of next-of-kin and creditors, administration may be granted to any person at the discretion of the Court, as to a receiver appointed by the Chancery Division (*In the goods of Moore*, [1892] Prob. 145; and see 20 & 21 Vict. c. 77, s. 73; and cases cited in Williams, *Executors*, 9th ed., p. 384 n. (s)). A person having a prior right to administer must be cited or consent before administration is granted to another. If the next-of-kin is an infant, administration *durante minore ætate* must be granted. An alien is capable of being administrator. A married woman can now act as administratrix without her husband's consent, and in all respects as if she were a *feme sole* (Married Women's Property Act, 1882, s. 18, and see s. 24). Under the Land Transfer Act, 1897, real estate, as therein defined, will now on an intestacy devolve to and become vested in the administrator as if it were a chattel real vesting in him (ss. 1 (1) and 24 (2)); and letters of administration may be granted in respect of real estate only, although there is no personal estate (s. 1 (3)). In granting letters of administration, where the deceased possessed real estate, the Court is to have regard to the rights and interests of persons interested in it, and the heir-at-law, if not one of the next-of-kin, is to be equally entitled to the grant with them, and the practice in the grant of letters of administration is to be adapted to the case of real estate (s. 2 (4), and see below, *Real Representative*). As to the practice relating to the grant of letters of administration, see Williams, *Executors*, 9th ed., pp. 389 *seq.*, and PROBATE.

Limited Administration.—Administration may be granted for a limited time or purpose: as *durante minore ætate*, where the executor is under age; *durante absentia*, where the executor or next-of-kin are out of the realm at the death of the testator or intestate; *pendente lite*, where a suit concerning the right of administration is pending (see 20 & 21 Vict. c. 77, ss. 70, 72); *cum testamento annexo*, where the executors have died before the testator, or have renounced. The office of administrator is not transmissible, as is that of executor, and the executor or administrator of an administrator has no right to carry on the administration. Accordingly, if an administrator dies, or an executor dies intestate, before the estate has been completely administered, an administrator *de bonis non* must be appointed.

An executor may be appointed to act at the expiration of a specified time, and meanwhile administration *cum testamento annexo* will be granted. Limited administration may also be granted until a will is transmitted to this country, or is found (see *In the goods of Wright*, [1893] Prob. 21), or during the incapacity of the executor or administrator (and see *In the goods of Anne Cooke*, [1895] Prob. 68); or there may be a grant limited to specific property, or a particular legacy, or to assign a trust term, or for commencing or carrying on proceedings in Chancery, or to a particular place (see *In the goods of Mann*, [1891] Prob. 293).

Administrator cum testamento annexo.—Where the appointment of executor fails by death in the testator's lifetime, or before probate, of the person appointed, or by his death intestate after probate, but before complete administration, or by his refusal to act, administration *cum testamento annexo* must be obtained. The grant is usually made to the person who has the greatest beneficial interest, the residuary legatee being preferred to next-of-kin and legatees. If the next-of-kin refuse, the grant may be made, after notice to them, to a legatee or creditor. Where an executor is out of the jurisdiction, the grant may be made to his attorney (*In the goods of Barker*, [1891] Prob. 251). On the executor's death the grant ceases (see *Webb v. Kirby*, 1857, 7 De G., M. & G. 376). Where there were no known relatives of the testator, and he had not appointed a residuary legatee, administration *cum testamento annexo* was granted to a stranger (*In the goods of Jackson*, [1892] Prob. 257).

Administrator durante minore etate.—This form of administration is a species of the grant *cum testamento annexo*, and is made where the sole executor is under the age of twenty-one years. It is usually made to the guardian. Formerly an infant executor was capable of acting on attaining the age of seventeen years, but by 38 Geo. III. c. 87, s. 6, the administration is to last until full age. Such an administrator has all the power and authority of an absolute administrator, and can sell for payment of debts (*In re Cope*, 1880, 16 Ch. D. 49). Although an administrator of an executor does not represent the testator (see above, *Chain of Representation*), an administrator *durante minore etate* of the executor of an executor is the representative of the first testator (*Anon.*, 1675, 1 Freeman, 287). Such an administrator is not liable to creditors after his administration has determined; their remedy is against the executor, to whom alone the administrator is liable.

Administrator de bonis non.—Where a sole or surviving executor dies intestate after probate and before complete administration, a grant of administration *de bonis non administratis* is required. Where a person appointed executor renounces probate, the administration devolves as if he had not been appointed (see the Court of Probate Act, 1857, 20 & 21 Vict. c. 77, s. 79, before which the renunciation might have been retracted). The grant will be made on the same principles as stated above in case of a grant *cum testamento annexo*. On the death of a sole or surviving administrator, whether testate or intestate, a grant of administration *de bonis non* will be necessary; and such grant will follow the interest; and accordingly where a husband dies after taking out administration to his wife, the grant will be made to his representatives, and not (as formerly) to the wife's next-of-kin, unless they are entitled to the beneficial interest. Generally, a person having a direct interest is preferred to one entitled in a representative character. On the death of a creditor administrator, the then next-of-kin of the intestate must be cited before grant of administration *de bonis non*.

Administrator pendente lite.—Pending any suit as to the validity of a will or as to any probate or grant of administration, administration *pendente lite* may be granted. Such an administrator has all the rights and powers of a general administrator, other than the right of distributing the residue (see 20 & 21 Vict. c. 77, s. 70. For examples of the grant, see *Tichborne v. Tichborne*, 1869, L. R. 1 P. & D. 730; *Wright v. Rogers*, 1870, L. R. 2 P. & D. 179; *In the goods of Fawcett*, 1889, 14 P. D. 152). The administrator may also be appointed receiver of the deceased's real estate, pending suit as to the validity of his will affecting his real estate (20 & 21 Vict. c. 77, s. 71). The grant may be made though the Chancery Court has appointed

a receiver. It is made to an indifferent person, who is to be considered the officer of the Court; his duties commence from the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of (*Taylor v. Taylor*, 1881, 6 P. D. 29); his functions terminate on a decree pronouncing in favour of a will with executors, and do not continue until probate (*Wieland v. Bird*, [1894] Prob. 262). The Chancery Division will not now appoint a receiver, where an administrator *pendente lite* has been, or may be, appointed (*Barr v. Barr*, 1876, W. N. 44; *In re Ivory*, 1878, 10 Ch. D. 372), except in special circumstances, such as danger to the assets. An administrator *pendente lite* may be sued in the Chancery Division by a creditor in the same way as a general administrator, and the leave of the Probate Division is not necessary (*In re Toleman*, [1897] 1 Ch. 866).

Administrator durante absentia.—Under 38 Geo. III. c. 87, and 21 & 22 Vict. c. 95, s. 18, at the expiration of twelve months from the testator's death, administration may be granted during the absence out of the jurisdiction of an executor to whom probate has been granted, or an administrator, upon the application of a creditor, next-of-kin, or legatee, whether proceedings in Chancery are or are not intended to be taken. The provisions of the Acts apply to the case of an executor of an executor (*In the goods of Grant*, 1876, 1 P. D. 435). The assignee in bankruptcy of an absent administrator indebted to the intestate's estate is a creditor within the Acts (*In the goods of Hammond*, 1881, 6 P. D. 104). At common law administration *durante absentia* of an executor or next-of-kin can be granted before probate or issue of letters of administration, and such administration is at an end when the executor or next-of-kin returns; but under the Acts the administration continues so long as the purpose for which it was granted subsists, and it does not determine on the death of the executor (*Taynton v. Hannay*, 1802, 3 Bos. & Pul. 26).

Administration Bond.—It is provided by sec. 81 of 20 & 21 Vict. c. 77, that a person to whom a grant of administration is committed shall give bond to the judge of the Court of Probate, and, if required, with one or more surety or sureties, to secure due administration. The penalty on the bond is double the amount under which the deceased's estate is sworn. On breach of the condition, the bond may be assigned and sued upon (see, as to such breach, *Dobbs v. Brain*, [1892] 2 Q. B. 207).

Effect of Probate.—Probate, even in common form, is, while unrevoked, conclusive as to the appointment of an executor, and the validity and contents of the will, and its due execution according to the law of the testator's domicile, but not that the testator was domiciled here (see *Bradford v. Young*, 1885, 29 Ch. D. 617; *Concha v. Concha*, 1886, 11 App. Cas. 541); hence, payment to an executor who has obtained probate of a forged will is a discharge to the debtor. But the effect of the will is for the Court of construction. As to the effect of probate in solemn form in matters relating to real estate, see PROBATE. Under the Land Transfer Act, 1897, all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real apply to real estate so far as the same are applicable, as if it were a chattel real vesting in the personal representatives (see s. 2 (2)). It seems that for the purpose of construing a will the Court is entitled to look at the original will as well as the probate (*In re Harrison*, 1885, 30 Ch. D. 390). As to revocation of probate and letters of administration, see PROBATE. Payments *bona fide* made under probates or letters of administration afterwards revoked to or by the executor or administrator are valid (20 & 21 Vict. c. 77, s. 77).

Estate Duty.—A duty called “estate duty” is now payable on death upon the principal value of all property, real or personal, settled or not settled, which passes on the death, at certain graduated rates (see the Finance Act, 1894, 57 & 58 Vict. c. 30, Part I., and the Finance Act, 1896, 59 & 60 Vict. c. 28, Part IV.); and the stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit made on applying for probate or letters of administration, and on the value of property included in accounts under the Customs and Inland Revenue Act, 1889, are not payable in respect of property chargeable with estate duty. The executor of the deceased (which expression means executor or administrator and any person who intermeddles with the deceased’s personality, see s. 22 (1)) must pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on the death, which by virtue of any testamentary disposition of the deceased is under the executor’s control, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to do so (s. 6 (2)). The executor is accountable for the duty, which he is bound to pay as above mentioned, but is not liable for any duty in excess of the assets which he has received, or might, but for his own neglect or default, have received (s. 8 (3)). See further on this subject, DEATH DUTIES, vol. iv. at p. 129.

Estate of Executor or Administrator.—The property of a deceased person vests in his executor upon his death, in his administrator from the grant of letters of administration, though for some purposes the grant will relate back to the death, so as to support an action by the administrator on behalf of the intestate’s estate. Between the death and the grant of administration the property vests in the judge of the Court of Probate, now the Probate Division of the High Court (see 21 & 22 Vict. c. 95, s. 19).

The estate of the executor or administrator being in *autre droit*, the goods of the deceased were not forfeited, under the former law, by the attainder of the executor or administrator, and similarly they do not pass to his trustee in bankruptcy, and cannot be taken in execution of a judgment against him in his own right; and there is no merger of the estate held by him as representative and that which he holds in his own right.

The representative cannot bequeath the assets by his will, but has, in general, an absolute power of alienating them.

No executor or administrator can be protector of a settlement in respect of an estate taken by him as such (see 3 & 4 Will. iv. c. 74).

The whole personal estate vests in the executor or administrator. Property held by the deceased jointly with others does not so vest, except in the case of partners in trade.

Under Lord St. Leonards’ Act (22 & 23 Vict. c. 35) executors have a power to sell real estate which the testator has charged with payment of debts and legacies, and has not devised to trustees. On a sale by executors of real estate charged with debts, the legal estate being vested in them, a purchaser is bound to inquire whether debts remain unpaid, after twenty years have elapsed from the testator’s death (*In re Tanqueray-Willauve and Landau*, 1882, 20 Ch. D. 465); but this rule does not in general apply on a sale of leaseholds (*In re Whistler*, 1887, 35 Ch. D. 561; *In re Venn and Furze*, [1894] 2 Ch. 101). The proceeds of sale of the real estate are equitable, and not legal, assets. See ASSETS.

As to the doctrine of equitable conversion, under which land may be

considered as money, and money as land, see CONVERSION OF PROPERTY. Land which has become partnership property will, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate (Partnership Act, 1890, s. 22; and see *In re Wilson, Wilson v. Holloway*, [1893] 2 Ch. 340, as to the devolution of land held for a partnership or other common object). The personal estate of an infant, or lunatic, laid out in the purchase of land by a trustee, or committee, may devolve as personalty (and see, as to lunatics, the Lunacy Act, 1890, s. 123).

Chattels Real.—These chattel interests issuing out of, or annexed to, real estate, go to the executor or administrator, and not to the heir, such as estates for years in lands and hereditaments, including leases of incorporeal hereditaments; estates by statute staple, statute merchant, and by *elegit*. A term of years, though specifically bequeathed, vests in the executor, and not, without his assent, in the legatee. Upon assent it vests in the legatee, and no deed of assignment by the executor is required to complete the legatee's title (*In re Culverhouse*, [1896] 2 Ch. 251). An estate *pur autre vie* of a person dying since the year 1837, not disposed of by will, and where there is no special occupant, and of whatever tenure, and whether a corporeal or incorporeal hereditament, goes to the executor or administrator, and is assets in his hands (see 1 Vict. c. 26, s. 6). A mortgage debt passes to the executor or administrator, and since 1881 an estate vested in a sole mortgagee vests on his death, notwithstanding any testamentary disposition, in his personal representatives, as if it were a chattel real (see the Conveyancing Act, 1881, s. 30; and see *post*, *Trust and Mortgage Estates*). Under the Land Transfer Act, 1897, real estate, as therein defined, will now devolve to and become vested in the personal representatives from time to time as if it were a chattel real vesting in them (s. 1); and all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and the dealing with them before probate or administration, are to apply to real estate as far as the same are applicable, as if it were a chattel real vesting in the personal representatives, except that some or one only of several joint personal representatives cannot, without the Court's authority, sell or transfer real estate (s. 2 (2)). In the Act the expression "personal representative" means an executor or administrator (s. 24 (2)). And see below, *Real Representative*.

The next presentation to a vacant benefice is a chattel personal, and passes to the executor or administrator. As to chattels real of a married woman, where the marriage and acquisition were before 1st January 1883, the surviving husband need not take out letters of administration (see *In re Bellamy*, 1883, 25 Ch. D. 620; *Surman v. Wharton*, [1891] 1 Q. B. 491), but where the wife's title accrues after the above-mentioned date, or if the marriage is on or after that date, the husband must complete his title by taking out administration. In cases not affected by the Married Women's Property Act, 1882, the chattels real of the wife, vested during the coverture, pass to the surviving husband *jure mariti*.

Chattels Personal.—Domestic or tame animals pass to the executor or administrator, but not deer in a legal park, doves in a dove-house, or fish in a pond, unless the deceased had only a term of years in the land, when they vest in the personal representative for the residue of the term. Trees and hanging fruits go with the land, unless severed in contemplation of law by sale or reservation. Vegetable products resulting from agricultural labour, usually called emblements, pass to the personal representative, but

not shrubs or plantations, nor crops of grass, except artificial grasses producing a crop within the year. The representative is entitled to emblements as against the heir of a tenant in fee-simple or fee-tail, but not against a dowress, or a devisee. So the personal representative of a tenant for life is entitled as against the remainderman. The case of agricultural tenants is provided for by the Agricultural Holdings Act, 1883 (and see *Gough v. Gough*, [1891] 2 Q. B. 665). The executors of an incumbent are entitled to emblements of the glebe under 28 Hen. VIII. c. 11. The personal representative of a tenant-at-will, whose tenancy is determined before harvest, will be entitled to emblements (see further on this subject under GROWING CROPS). Chattels personal inanimate pass to the personal representative, except heirlooms, which go to the heir or successor in title (see HEIRLOOMS); fixtures, which go to the heir, devisee, or remainderman (see FIXTURES); and paraphernalia, which go to the widow (see HUSBAND AND WIFE).^{*} But after 1897 chattels passing with real estate will, in the first instance, devolve on the personal representative (see the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., and *post*, *Real Representative*).

Choses in Action.—All personal actions founded on contract or duty survive to the executor or administrator, but not, in general, those founded on tort; but a right of action, whether founded on contract or tort, survives to the personal representative, if injury has been done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the representative (see *Twyeross v. Grant*, 1878, 4 C. P. D. 40; *Phillips v. Homfray*, 1883, 24 Ch. D. 439, 456; *Bathgany v. Walford*, 1887, 36 Ch. D. 269, 281; *Pulling v. G. E. Ry. Co.*, 1882, 9 Q. B. D. 110, 112). Actions founded on torts to the freehold, such as trespass or waste, do not survive, except that the personal representative may, within a year from the death of the deceased person, bring an action for injury to his real estate committed within six months before the death (3 & 4 Will. IV. c. 42, s. 2). The continuance of an obstruction to ancient lights is an injury within the meaning of the Act, giving rise to a cause of action *de die in diem* (*Jenks v. Viscount Clifden*, [1897] 1 Ch. 694). The executor or administrator can also maintain an action, under Lord Campbell's Act (9 & 10 Vict. c. 93), for damages in respect of the deceased's death when caused by a wrongful act, neglect, or default (see vol. i. p. 105; and see also the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897, s. 7 (2), and Sched.). The executor can sue on a covenant real, unless it be one in which the heir alone can sue for a breach in the testator's lifetime, or unless it is a mere personal covenant, which does not survive (see *Ricketts v. Wearer*, 1844, 12 Mee. & W. 718). Shares in companies under the Companies Act, 1862, and stock in the public funds, devolve upon the personal representative, and are transferable by him after registration of the probate or letters of administration. He has no power to enforce a contract of service by a servant of the deceased, nor, in general, any interest in his apprentice, except in the case of parish apprentices (see 32 Geo. III. c. 57). Rent accruing under a lease by an owner in fee goes with the reversion; under an underlease by lessee for years to the personal representative, to whom also pass arrears accrued in the deceased's lifetime; and rent is considered as accruing from day to day, and is apportionable as between the heirs or remainderman and the personal representative (the Apportionment Act, 1870, 33 & 34 Vict. c. 35; and see APPORTIONMENT). Fines, reliefs, and heriots, due to a lord of a manor at his death, pass to his personal representative. The interest in a joint *chase in action* does not pass to the executor, except in cases of partnership. A bankrupt's *choses*

in action vest in the trustee in his bankruptcy (Bankruptcy Act, 1883, s. 50 (5)). Arrears of pin-money are not recoverable by the wife's personal representative. A deceased's wife's *choses in action* do not, since the Married Women's Property Act, 1882, vest in her surviving husband's *jure mariti*, but only as her administrator. Under the former law, the wife's *choses in action* not reduced into possession during the coverture survived to her on his death in her lifetime, except where the husband's personal representative was entitled by reason of an antenuptial settlement on the wife.

After the death of the testator or intestate the executor or administrator may bring an action for damages for torts done to the estate, and may sue either in his representative capacity or in his own name, as also on contracts made with him in his representative character; and in contracts made with the deceased he may in general sue although the breach occurs after the death, and though the contract was made with the deceased and his assigns. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which he sues or is sued as executor or administrator (R. S. C., Order 18, r. 5; and see *Harding v. Harding*, 1886, 17 Q. B. D. 442, 446; *Padwick v. Scott*, 1876, 2 Ch. D. 736, 743). This rule does not apply to plaintiffs by counterclaim (*Macdonald v. Carington*, 1878, 4 C. P. D. 28). Contingent and executory interests may vest in right, though not in possession, and be transmissible to the personal representative.

Change of Parties by Death.—A cause or matter does not become abated by death of any party, if the cause of action survive or continue in some person who is before the Court (R. S. C., Order 17, r. 1; *Eldridge v. Burgess*, 1878, 7 Ch. D. 411; *In re Shephard*, 1889, 43 Ch. D. 131). The action, however, abates on the death of a sole plaintiff or defendant, but may be revived if the estate or right devolves on some person representing the original party. In case of death of a party the Court may order that the personal representative be made a party or be served with notice (r. 2); and an order to carry on proceedings between the continuing parties and the new party may be obtained *ex parte* (rr. 4, 5). Where the plaintiff or defendant dies, and the cause of action survives, but the person entitled to proceed fails to do so, the defendant or person against whom the cause or matter may be continued may apply by summons to compel the plaintiff, or person entitled to proceed, to proceed within a limited time, in default of which judgment may be entered for the applicant; and in such case, if the plaintiff dies, execution may issue as provided by the rules (r. 8, and see Order 42, r. 23). Whether the cause of action survives or not, there is no abatement by death of either party between the verdict, or finding of the issues of fact, and the judgment, but the judgment may in such case be entered notwithstanding the death (R. S. C., Order 17, r. 1).

As to actions of trespass under 3 & 4 Will. IV. c. 42, s. 2, by executors, see *Kirk v. Todd*, 1882, 21 Ch. D. 484; *Jones v. Simes*, 1890, 43 Ch. D. 607; and against executors, *Phillips v. Homfray*, [1892] 1 Ch. 465; *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694).

In an action by co-plaintiffs having separate causes of action, if one die before trial, the judgment thereat cannot be pleaded against his personal representative in a fresh action (*Arnison v. Smith*, 1889, 40 Ch. D. 567, 571).

An executor obtaining an order to continue an action, even after judgment, becomes liable for costs *ab initio*, as if the action had been commenced by him (*Boynton v. Boynton*, 1879, 4 App. Cas. 733).

Where any change has taken place by death in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply for leave to issue it accordingly to the Court or a judge, who may give leave or order an issue to be tried (R. S. C., Order 42, r. 23). Where the plaintiff died after judgment, leave to issue execution was granted to his executors on production of the probate (*Mercer v. Lawrence*, 1878, 26 W. R. 506). Until such leave has been obtained, the executors cannot issue a bankruptcy notice against the judgment debtor (*Ex parte Woolfall*, 1884, 13 Q. B. D. 479). Where an action does not abate by the death of one party, it seems that a reference of that action to arbitration remains binding on the surviving parties. Where after an agreement to refer, but before appointment of the arbitrators, one party dies, and his executor refuses to appoint, the Court will not make the appointment (under the Arbitration Act, 1889, s. 5).

Estate of Executor's Executor, and of Administrator de bonis non.—The executor's executor, throughout the chain of representation, has the same interest in the estate of the original testator as the first executor had. An administrator *de bonis non* is entitled to all the assets which remain unadministered. His right to enforce judgments obtained by the original executor or administrator is governed by R. S. C., Order 42, r. 23.

Power of Attorney.—Under the Trustee Act, 1893, s. 23, a trustee (which expression includes the personal representative of a deceased person; see s. 50) acting or paying money in good faith under or in pursuance of any power of attorney is not liable by reason of the fact that at the time of the payment or act the person who gave the power was dead, or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Trust and Mortgage Estates.—Under the Conveyancing Act, 1881 (s. 30), on the death of a sole trustee or mortgagee an estate or interest of inheritance, or limited to the heir as special occupant, in any tenement or hereditaments, corporeal or incorporeal, vested in such trustee or mortgagee devolves to and becomes vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him; and accordingly they or he may exercise the like powers as one only of several joint personal representatives, or a single personal representative (see *Co-Executors and Co-Administrators*), or all the personal representatives together, to dispose of and otherwise deal with the same, as if the same were a chattel real. For the purposes of the above provision the personal representatives for the time being of the deceased are to be deemed in law his heirs and assigns, within the meaning of all trusts and powers. The above section does not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage (the Copyhold Act, 1894, 57 & 58 Vict. c. 46, s. 88). When there is no personal representative a vesting order is necessary (*In re Williams' Trusts*, 1887, 36 Ch. D. 231). The above section of the Conveyancing Act, 1881, appears to be superseded by the general provisions contained in the Land Transfer Act, 1897, 60 & 61 Vict. c. 65, noticed *post*, *Real Representative*.

Powers of Executor or Administrator.—He may enter the house of the heir, but without violence, to remove the deceased's goods, and to take documents relating to the personal estate; and may distrain for rent issuing out of a freehold or inheritance due to the testator or intestate in his lifetime (32 Hen. VIII. c. 37); but if rent be in arrear, and the owner grants away his interest, and dies, the personal representative has no remedy for the arrears; and the land must be in the hands of the tenant from whom the rent is due,

or some one deriving title under him (*Co. Lit.* 162 b). Copyhold lands are not within the statute. In like manner distress may be made for arrears of rent of land demised for a term or at will (3 & 4 Will. IV. c. 42, s. 37). The executor or administrator has absolute power to alien the assets, which cannot be followed by creditors or legatees into the hands of the alienee, and including chattels, personal or real, specifically bequeathed, though it may be desirable to have the concurrence of the legatee (see Dart, *Vendors and Purchasers*, 6th ed., p. 673 n. (z)). So he may, in general, mortgage the assets. A *bona fide* purchaser or mortgagee is not bound to see to the application of the money so raised; but where there is collusion between the personal representative and the purchaser or mortgagee, creditors and legatees may follow the assets, within a reasonable time. A purchase by the executor or administrator of the personal estate, or of the real estate when he is selling in exercise of the implied or statutory power for payment of debts, is voidable at the instance of the persons interested in the estate (Dart, p. 40); but this rule does not apply to the case of a person appointed executor who does not prove (*Clark v. Clark*, 1884, 9 App. Cas. 733). An executor or administrator may grant an underlease of the leaseholds of the testator or intestate, if necessary for the due administration of the property, but cannot give an option of purchase at a future time (*Oceanic Steam Navigation Co. v. Sutherland*, 1880, 16 Ch. D. 236). But such an assignment or underlease may be restrained by a condition in the lease. The powers of the personal representative are not put an end to by the mere commencement of a creditor's action for administration. An executor and administrator may pay or allow any debt or claim on any evidence that he thinks sufficient, and may accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate, and execute agreements, releases, etc. (Trustee Act, 1893, s. 21 (1) (2)); and these provisions apply to executorships and administratorships constituted either before or after the commencement of the Act (s. 21 (4)).

Co-Executors and Co-Administrators.—The law regards co-executors as an individual person, and in the administration of the effects the acts of one are deemed to be the acts of all. Hence, one of several executors may release a debt, surrender a term, distrain for rent, sell chattels, including chattels real (see *Simpson v. Gutteridge*, 1816, 1 Madd. 609, 616; 16 R. R. 276; *Sneesby v. Thorne*, 1855, 1 Jur. N. S. 1058; the Conveyancing Act, 1881, s. 30 (1)); assent to a legacy, including his own. But possession of a personal chattel, or of land demised to the testator, by one executor will not impose a liability on the other personally. The power of one of several administrators is, it seems, the same as that of one of several executors (*Willand v. Fenn*, cited in *Jacob v. Harwood*, 1751, 2 Ves. 267). Where a power is given to two or more executors (constituted on or after 1st January 1882) it may be exercised by the survivor or survivors of them for the time being, unless the contrary is expressed by the will (see the Conveyancing Act, 1881, s. 38). Where probate is granted to one of several co-executors, it enures to the benefit of all, and one who has not proved will be readily deemed to have accepted the office, if he intermeddle (*Cummins v. Cummins*, 1845, 3 Jo. & Lat. 64, and see *Kilbee v. Sneyd*, 1828, 2 Mol. 186). Where one of several executors is an infant, those of full age can act alone. Where in an action against several executors to recover a debt due from the testator, they plead different inconsistent pleas, the Court will enforce the plea which

is most for the benefit of the estate (*Midgley v. Midgley*, [1893] 3 Ch. 282). A *devastavit* by one of several executors or administrators will not charge the other, provided he has not intentionally or otherwise contributed to it (Cro. (1) 319; and see *post*, *Devastavit*). An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. iv. c. 14, s. 1) made by one of several executors as executor binds the testator's estate (*In re Macdonald*, [1897] 2 Ch. 181). On the death of one of several executors or administrators the office survives. Co-executors must all join in bringing actions, even though some be infants; but if one only has proved, he may sue without making the others parties, though they have not renounced (*Daniell's Chancery Practice*, 6th ed., 224). If one of several executors who have proved sue alone, the defendant may apply to the Court to have the others made parties (R. S. C., Order 16, r. 11). One executor cannot, as a rule, sue or be sued by his co-executor.

Duties of Executor or Administrator.—(1) He must bury the deceased in a manner suitable to his estate, and will be allowed such expenses of so doing as are reasonable under the circumstances (see, as to a husband executor, *In re M'Myn*, 1886, 33 Ch. D. 575). There is no property in a dead body, and a direction by will as to the disposition of the testator's body cannot be enforced (*Williams v. Williams*, 1882, 20 Ch. D. 659; as to cremation, see *R. v. Prier*, 1884, 12 Q. B. D. 247). (2) He must obtain probate or letters of administration within the prescribed time. (3) Formerly he was bound to exhibit an inventory of the assets, but according to the modern practice no inventory is in general required, and the right to sue for one by a person interested may be barred by lapse of time. (4) He must collect the deceased's effects with reasonable diligence, *e.g.* he must not, by unduly delaying an action, enable a debtor to plead the Statute of Limitations (*Hayward v. Kinsey*, 1700, 12 Mod. 573). (5) As to the payment of debts: The deceased's estate, both legal and equitable assets (as to which see ASSETS), must be applied in payment of, first, the funeral expenses; next, the expenses of probate or taking out administration, including the costs of an administration action and other executorship expenses; and then the debts of the deceased are payable out of legal assets in the following order: (*a*) Crown debts due by matter of record—a surety to the Crown having the like priority (*In re Lord Churchill*, 1888, 39 Ch. D. 174); (*b*) debts having priority by statute, *e.g.* under the Friendly Societies Act, 1896, s. 35; (*c*) debts of record, consisting of judgments in Courts of record and recognisances: a decree in a Court of equity against a testator or intestate was in this respect equivalent to a judgment at law; among themselves judgments have no precedence: (*d*) debts by specialty and simple contract. Formerly specialty debts took precedence, but by 32 & 33 Vict. c. 46 both classes now stand in equal degree, and are payable accordingly out of the assets, whether legal or equitable. A voluntary bond or covenant is payable after debts owing for valuable consideration. Of simple contract debts those due to the Crown have precedence; where necessary the assets will be apportioned between specialty and simple contract debts, and the Crown debt will be taken out of the amount apportioned to simple contract creditors (*In re Bruntink*, [1897] 1 Ch. 673). Where a person dies insolvent certain wages and salaries have precedence over all other debts (see 51 & 52 Vict. c. 62, s. 1 (1) (6)); and the priorities conferred by this Act apply in the administration by the Chancery Division of the estates of persons dying insolvent after the commencement of the Act (*In re Heywood*, [1897] 2 Ch. 593). Formerly damages for dilapidations payable by the executors or administrators of a deceased incumbent

were postponed to the other debts of the deceased, but they are now regulated by 34 & 35 Vict. c. 43, and are payable *pari passu* with the other debts (see *In re Monk*, 1887, 35 Ch. D. 583). An executor or administrator may voluntarily pay an inferior debt before a superior one of which he had no notice, and may plead judgment for such a debt in bar to the superior creditor. Among creditors of equal degree an executor or administrator may pay one in preference to another, though with notice of an action by another creditor, but before judgment (*Vibart v. Coles*, 1890, 24 Q. B. D. 364), and the power no longer exists after judgment in an administration action by a creditor on behalf of himself and all other creditors. But an order for an account under R. S. C., Order 15, r. 1, does not take away the right of preference (*In re Barrett*, 1889, 43 Ch. D. 70). A creditor who has a preferential claim upon the legal assets, and has been partly paid thereout, cannot resort to the equitable assets until the other creditors have been paid a like proportion of their debts (*Bain v. Sadler*, 1871, L. R. 12 Eq. 570). As to the order in which assets are applicable in the payment of debts, see ASSETS. Executors or administrators are not bound to apply the assets in this order in the first instance, and the rights of parties beneficially interested in the surplus assets will be subsequently adjusted by the process of marshalling (see ASSETS and MARSHALLING). As to the retainer of his own debt by an executor or administrator, see *post*, Retainer. It is the duty of the executor or administrator to protect the deceased's estate against demands which by law cannot be enforced against it, and as a general rule he commits a *deceit* if he pays a debt which need not be paid, such as one not enforceable by reason of the Statute of Frauds (*In re Rowson*, 1885, 29 Ch. D. 358); but there is an anomalous exception to the general rule, viz. that he may, before a judgment for administration of the estate has been made, pay a debt barred by the Statute of Limitations, but not if such debt has been judicially declared to be statute-barred; and if an action for the debt is brought against several executors, and they plead different inconsistent pleas, that plea is to be enforced by the Court which is most for the benefit of the estate (*Midgley v. Midgley*, [1893] 3 Ch. 282). After a judgment for administration any creditor or other party interested may require the defence of the statute to be set up (*Shrewen v. Vanderhorst*, 1831, 1 Russ. & M. 347; 2 Russ. & M. 75; *In re Wenham*, [1892] 3 Ch. 59).

Retainer.—As an executor or administrator has, before judgment for administration, a right among creditors of equal degree to pay one in preference to another, so, not being able to sue himself, he may retain his own debt as against a creditor of equal degree. *Hinde Palmer's Act*, 1869 (32 & 33 Vict. c. 46), which placed specialty and simple contract creditors on an equal footing *inter se* for the purpose of payment, did not extend the right of retainer, which can still only be exercised as against creditors of equal degree (*In re Jones, Calver v. Laxton*, 1885, 31 Ch. D. 440). The right is a legal one, and can be exercised only in respect of legal assets come to the hands of the executor or administrator, but a Court of equity will not assist a retainer, and, since in equity all debts are equal, the executor can out of equitable assets retain rateably only with the other creditors (see ASSETS).

Where an executor by retainer out of the legal assets obtains payment of part only of his debt, he cannot resort to the equitable assets until the other creditors have been paid a like proportion of their debts (*Bain v. Sadler*, 1871, L. R. 12 Eq. 570). The right is not taken away by a judgment for administration, nor lost by payment into Court in an administration action, whether by the executor or a third party in his presence, which is

in substance a payment in by the executor (*Richmond v. White*, 1879, 12 Ch. D. 361; *In re Compton*, 1885, 30 Ch. D. 15); but when a receiver is appointed, retainer cannot be claimed out of assets got in by him (*In re Harrison*, 1886, 32 Ch. D. 395; *In re Jones*, *ubi supra*; *In re Birt*, 1883, 22 Ch. D. 604). On the other hand, the Court will not appoint a receiver merely to defeat the right of retainer (*In re Wells*, 1890, 45 Ch. D. 569). Where in an administration action an executor sues on behalf of himself and all other creditors, and submits to account in the usual form, his right of retainer is not affected (*Ex parte Campbell*, 1880, 16 Ch. D. 198). The Court will not order payment out of a fund to an executor or administrator merely in order to enable him to retain thereout a statute-barred debt (*Trevor v. Hutchins*, [1896] 1 Ch. 844). An executor or administrator may retain not only for his own debt, but for one to which he is entitled as trustee, and also for a debt due to another as trustee for him (*Loomes v. Stotherd*, 1823, 1 Sim. & St. 458; 24 R. R. 209; *Marriott v. Thompson*, 1739, Willes, 186). The right may be exercised by an administrator *durante minoritate*, by the executor of an executor or administrator, but not by an executor *de son tort*, unless he afterwards obtain administration. An executor who is surety for an unpaid debt of his testator may retain for it (*In re Giles*, [1896] 1 Ch. 956). An administrator who is an annuitant under covenant of the intestate, whose estate is insolvent, may retain for all arrears falling due during administration (*In re Beeman*, [1896] 1 Ch. 49). A creditor administrator may retain, but according to the practice of the Probate Division a creditor on taking out administration must in all cases if required by the Court enter into a bond conditional to administer the estate rateably among the deceased's creditors (*In the goods of Brackenbury*, 1877, 2 P. D. 272). An executor cannot retain against his co-executor; retainer by one enures for the benefit of both in proportion to their debts. An executor or administrator may, before judgment for administration, retain his debt though statute-barred, in like manner as he may, as a general rule, pay such a debt (*Stahlschmidt v. Lett*, 1853, 1 Sm. & G. 415; *Hill v. Walker*, 1858, 4 Kay & J. 166); but an executor or administrator commits a *devastavit* by paying a debt to a creditor who is prevented from enforcing it by the Statute of Frauds, and similarly cannot retain for such a debt (*In re Robinson*, 1885, 29 Ch. D. 358). The executor of a deceased pauper may retain as against the claim of the guardians for maintenance, which is an ordinary, and not a preferential debt (*Laver v. Botham & Sons*, [1895] 1 Q. B. 59). The right of retainer is not lost merely by reason of explainable delay (*In re Giles*, [1896] 1 Ch. 956). It is not affected by sec. 10 of the Judicature Act, 1875, incorporating the rules of administration in bankruptcy into the administration of an insolvent estate (*Lee v. Nuttall*, 1879, 12 Ch. D. 61); and a widow, the administratrix of her husband's insolvent estate, was allowed to retain the amount of a loan to him in his business out of her separate estate (*In re May*, 1890, 45 Ch. D. 499; and see *In re Leng*, [1895] 1 Ch. 652, 656, 660). There is no right of retainer out of an estate devised to the executor as trustee for sale for the purpose of paying debts (*Bain v. Sadler*, 1871, L. R. 12 Eq. 570). One of several executors may retain in respect of a mortgage debt due to trustees of whom he is one (*In re Hubback*, 1885, 29 Ch. D. 934). As to retainer out of goods, see *In re Gilbert*, 1897 (W. N. 1897, 174).

Sale by Executors under Charge of Debts.—A direction in a will that the debts shall be paid charges them on the real estate; an authority, as distinct from a direction to pay, does not (*In re Head's Trustees and Macdonald*, 1890, 45 Ch. D. 310); nor does a direction that the debts shall

be paid by the executors; but if the executors are also devisees of all the testator's interest in the real estate, whether beneficially or in trust, the estate is charged (*In re Tanqueray-Willauime and Landau*, 1882, 20 Ch. D. 465, 479), and this is so whether the executors take the whole beneficial interest, or only an estate for life, or in tail, or a trust estate; or where they take the whole of the residuary realty in trust, or where the realty is devised to one of them for life with remainder to the other (*In re Tanqueray-Willauime and Landau*, *ubi supra*; and see *Marshall v. Gingell*, 1882, 21 Ch. D. 790; *In re Lashmar*, [1891] 1 Ch. 258, 262; *In re Brooke*, [1894] 1 Ch. 43). The question is one of intention, to be collected from the whole will (*Bailey v. Bailey*, 1879, 12 Ch. D. 268). In cases before Lord St. Leonards' Act (see *post*), the executors can sell and pass the legal estate, where there is a direction in the will for sale for payment of debts, or debts and legacies, although there is no devise for this purpose; and where there is a mere charge they have an implied power to sell, and the person in whom the legal estate is vested becomes a trustee of it, and a vesting order can be obtained. Where there is a direction to pay debts, a devisee of the estate charged, who is also an executor, can make a good title without the concurrence of his co-executor, if the purchaser has no notice of a breach of trust by the devisee (see *Corser v. Cartwright*, 1875, L. R. 7 H. L. 731; *West of England and South Wales District Bank v. Murch*, 1883, 23 Ch. D. 138). Twenty years since the testator's death is a reasonable limit within which a sale for payment of debts may be made under a charge of debts, after which it must be presumed that the debts have been satisfied (*In re Tanqueray-Willauime and Landau*, *ubi supra*); but this rule does not extend to the case of a sale of leaseholds by an executor (*In re Whistler*, 1887, 35 Ch. D. 561; *In re Venn and Furze's Contract*, [1894] 2 Ch. 101). If, in a will coming into operation since August 13, 1859, the testator has charged his real estate, or any specific portion, with his debts, or any legacy or specific money, and has not devised the hereditaments charged so that his whole estate and interest therein has become vested in any trustee, the executors, if any, have power, notwithstanding any trusts declared in the will, to raise such debts, legacy, or money by sale or mortgage (Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 16); and this power devolves to the persons (if any) in whom the executorship for the time being is vested, but the section does not extend to an administrator (*In re Clay and Tetley*, 1880, 16 Ch. D. 3). A charge of legacies on lands devised beneficially in fee or in tail does not give the executors a power of sale (*In re Rebbeck*, 1894, W. N. 68; and see *Dart, Vendors and Purchasers*, 6th ed., 692-700; *Davidson, Precedents in Conveyancing*, 4th ed., vol. ii. Part I. p. 328 n. (b)).

Legacies.—As to the various descriptions of legacies, and their ademption, see LEGACY; ADEPTION. The appointment by a testator of his debtor to be executor operates at law as a release of the debt, since the executor cannot sue himself; and it seems that probate of the will is not a necessary condition (*In re Applebee*, [1891] 3 Ch. 422); but in equity the executor would be bound to account for his debt, unless the claim were rebutted by evidence of the testator's intention to forgive the debt (see *Strong v. Bird*, 1874, L. R. 18 Eq. 315; *In re Applebee*, *ubi supra*).

Where the administration of a creditor's estate is granted to his debtor, the remedy at law is only temporarily suspended, and there is no release of the debt; nor where a debtor is made executor *durante minore etate*. Where a creditor is appointed executor of his debtor, the debt is extinguished if the executor has assets of the debtor, which he may retain

in payment of the debt; and the same result follows where one of several co-debtors makes the creditor his executor; and where the debtor appoints his creditor one of several executors, if the creditor administers. A legacy to an executor for his trouble has no priority (*Duncan v. Watts*, 1852, 16 Beav. 204; *In re J. Thorley*, [1891] 2 Ch. 613).

All debts must be paid or provided for before legacies, whether specific or otherwise, are satisfied; and the executor or administrator may protect himself against claims on the estate by advertisement in the manner prescribed by 22 & 23 Vict. c. 35, s. 29; and may then distribute the assets, having regard only to the claims of which notice has been given to him; but the right of the creditor or claimant to follow the assets is not thereby prejudiced.

Executor's Assent.—As already mentioned, the executor is bound to apply his testator's estate, in the first place, in the payment of the debts of the deceased, and accordingly his assent is necessary to complete the title of a legatee, general or specific, and whether of chattels real or personal. Before such assent the legatee's right is inchoate, transmissible to his own personal representatives. A Court of equity can compel the executor to give his assent, if it is refused without cause (*Com. Dig. Admon. c. 8*). An assent need not be in any particular form, and may be express or implied (see *Thorne v. Thorne*, [1893] 3 Ch. 196), or upon reasonable condition precedent: it may be given before probate, and by one of several executors, and to the executor's own legacy, and by an administrator *durante minore aetate*; an assent to a life interest vests the remainder, and *vice versa*. An assent cannot, as a general rule, be retracted, and it has relation to the time of the testator's death. If an executor renounces probate, he cannot assent to his own legacy. Upon assent being given, the title to anything specifically bequeathed vests at law in the legatee absolutely. In the case of leaseholds, no deed of assignment by the executor is required to complete the title of the legatee (*In re Colverhouse*, [1896] 2 Ch. 251; and see *Austin v. Biddoe*, 1893, W. N. 78). Under the Land Transfer Act, 1897, real estate will now devolve upon the personal representatives, as if it were a chattel real, notwithstanding any testamentary disposition, and the assent of the personal representatives will be required to a devise contained in the will (see *post*, *Real Representatives*). No assent is necessary to perfect the title of a donee under a *donatio mortis causa* (*Tate v. Hilbert*, 1793, 2 Ves. 111, 120; and see *DONATIO MORTIS CAUSÆ*).

Appropriation.—Where a legacy is payable *in futuro*, the legatee is entitled to have a sufficient sum set apart to answer it when it becomes due (see Williams, *Executors and Administrators*, 9th ed., 1256 *seq.*). When an appropriation has been validly made in respect of specific or pecuniary legacies, the legatees must bear any loss arising from the diminution of the appropriated fund (*Fraser v. Murdoch*, 1881, 6 App. Cas. 855; *In re Lepine*, [1892] 1 Ch. 210); otherwise, they must be paid in full (*Baker v. Farmer*, 1868, L. R. 3 Ch. 537). After appropriation the executor cannot retain any part of the appropriated fund to meet a debt due from the legatee to the testator (*Ballard v. Marsden*, 1880, 14 Ch. D. 374). An executor has power, without express authority in the will, to agree with a legatee to appropriate to him a specific portion of the estate; and when a complete appropriation has been made in favour of a residuary legatee, he cannot be deprived of the benefit of it through subsequent reduction of the residue by loss of assets (*In re Lepine, ubi supra*). The Land Transfer Act, 1897, contains provisions for the appropriation of any part of the

deceased's residuary estate in or towards satisfaction of a legacy or share of that estate (s. 4).

Executor's and Administrator's Year.—In order that the executor may be able to inform himself of the state of the testator's assets, and to pay his debts, he is allowed a year from the testator's death before he can be compelled to pay legacies, although the will may direct earlier payment; but he may pay within the year, if circumstances so admit. Similarly, an administrator is allowed a year before he can be compelled to distribute the intestate's estate. As to interest on legacies in an administration action, see *R. S. C.*, Order 55, r. 64, and *In re Waters*, 1889, 42 Ch. D. 517.

Infant Legatee.—Without the sanction of the Court, the executor cannot safely pay a legacy given to an infant, to him, or his father, or other person on his behalf, unless expressly authorised by the will. The executor may, however, pay the legacy into Court, under the Trustee Act, 1893 (see s. 42, and the definition of "trust" and "trustee," s. 50), by which the Legacy Duty Act, 36 Geo. III. c. 52, was repealed. Where executors neglected to pay in under the Legacy Duty Act, the legatee recovered against them the amount of the legacy, with interest at 4 per cent., and costs (*Rimell v. Simpson*, 1848, 18 L. J. Ch. 55). By the Conveyancing Act, 1881, s. 43, trustees are empowered in certain cases to pay or apply the income of an infant's property for his maintenance, education, or benefit (and see *In re Holford*, [1894] 3 Ch. 30; *In re Jeffery*, [1895] 2 Ch. 577, as to members of a class). Where the residue of an estate, bequeathed to an infant, has been ascertained, the executor is a trustee of it for the infant within the above provisions, and may apply the income for maintenance, etc. (*In re Smith*, 1889, 42 Ch. D. 302). See further on this subject under INFANT. A legacy to an infant appointed executor does not carry interest until the infant attains twenty-one and acts (*In re Gardner*, 1892, W. N. 164).

Refunding Legacies.—If an executor voluntarily pays a legacy, he cannot call on the legatee to refund in order to pay other legatees: otherwise, if he pays under legal compulsion; and if he pays legacies, and afterwards debts appear of which he had no notice, he can compel the legatees to refund. If he pays the residue to the residuary legatee, with notice of a debt, which he is afterwards obliged to pay, he cannot call on the residuary legatee to refund. But notice of a remote contingent liability, which has not become a debt, will not deprive the executor of the right to compel refunding (*Whittaker v. Kershaw*, 1890, 45 Ch. D. 320). Refunding may be compelled by an unsatisfied creditor, where the assets are insufficient for payment of both debts and legacies; and this though the executor himself is the creditor (*Jervis v. Wolferstan*, 1874, L. R. 18 Eq. 18, 25; and see on this subject, *In re Broyden*, 1888, 38 Ch. D. 546). Where the assets were sufficient to pay all legacies, but become deficient through the executor's *derangement*, or accident, an unpaid legatee can compel refunding by one who has been paid; and so of shares of residue, or distributive shares of an intestate's estate; but it is otherwise if the assets were originally insufficient: but the disappointed legatee must first proceed against the executor.

Payment of the Residue.—The clear residue of the testator's estate, after payment of funeral and testamentary expenses, debts, and legacies, must be paid to the residuary legatee, if any. Formerly, if no residuary legatee were appointed, the residue belonged to the executor beneficially, unless by implication or presumption he appeared to be a trustee only, in which case he held for the next-of-kin, or, if none, for the Crown. But now, under 1 Will. IV. c. 40, the executor is a trustee of any residue not expressly disposed of for the persons entitled under the Statute of Distributions,

unless it appears by the will that he was intended to take beneficially. But if there are no next-of-kin, and no contrary intention appears by the will, the executor will be entitled as against the Crown (see s. 2 of the Act, and *Russell v. Clowes*, 1846, 2 Coll. 648). But where the residue of the proceeds of sale devised to executors upon trust for sale is not effectually disposed of, it will belong to the Crown (under the Intestates' Estates Act, 1884, 47 & 48 Vict. c. 71), and not to the executor (*In re Wood*, [1896] 2 Ch. 596). An executor has power to appropriate specific portions of the estate, though not specially authorised by the will: and a residuary legatee has power to accept such an appropriation in accord and satisfaction of his share (*In re Lepine*, [1892] 1 Ch. 210). Under the Land Transfer Act, 1897, the residuary realty also will be distributable by the executors (see ss. 1, 2, 3).

Distribution of Intestate's Estate.—The application of an intestate's personal estate is regulated by the Statutes of Distribution (22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7): see DISTRIBUTIONS, STATUTE OF; but where the real and personal estates do not exceed £500 in net value, they will now belong to the intestate's widow, if he leaves no issue; and where the net value exceeds £500, the widow is entitled to £500, absolutely and exclusively out of and charged on such estates (see the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29). The Act does not, like the statute of Charles II., apply to a partial intestacy (*In re Trigg's Estate*, [1892] 1 Ch. 579). Dower out of the intestate's real estate is subject to abatement in respect of the charge (*In re Charrere*, [1896] 1 Ch. 912). Where a widow entitled to her husband's estate, as being of the net value of under £500, died without taking administration to it, the Court granted administration to her executor (*In the goods of Bryant*, [1896] Prob. 159). Although there is to be no distribution of an intestate's effects until the expiration of a year from his death (see 22 & 23 Car. II. c. 10, s. 8), yet if a person entitled to a share dies within the year, his interest is vested, and goes to his personal representative. If debts appear after distribution, each person who took a share must refund proportionately to the administrator. The special customs of London and York with respect to the distribution of an intestate's personal estate were abolished by 19 & 20 Vict. c. 94, as to deaths on or after January 1, 1857.

Legacy and Succession Duties.—As to the duties in respect of legacies and successions, see DEATH DUTIES. The duty on any legacy or residue must be paid by the executor or administrator upon retainer for his own or another's benefit, or delivery, payment, or discharge of the legacy or residue. The legacy duty must be deducted by the executor when he pays the legacy, otherwise he is personally responsible (see as to the difference in this respect between legacy duty and succession duty on a sum covenanted to be paid by a testator, *In re Higgins*, 1885, 31 Ch. D. 142, 146). By 52 & 53 Vict. c. 7, limitation to claims by the Crown for succession and legacy duties has been imposed in certain cases (see ss. 12-15). See Hanson, *Death Duties*, 4th ed. The provisions of the Land Transfer Act, 1897, as to the establishment of a real representative are not to affect any duty payable in respect of real estate, or impose on real estate any new duty (see s. 5). •

Assets.—As to assets and the distinction between legal and equitable assets, the order in which assets are applicable in payment of debts, and the marshalling of assets, see ASSETS; MARSHALLING.

Liabilities of Representatives.—(a) *For Deceased's Acts.*—A right of action in matters of contract on which a testator or intestate might have

been sued in his lifetime survives against his executor or administrator, and he is liable on every contract of the deceased, whether named in the contract or not; but not where the contract is merely personal to the testator or intestate, unless a breach occurs in the deceased's lifetime. As a rule, an action for a tort committed by the deceased cannot be brought against his executor or administrator, though in some cases a remedy can be had against them. Under 3 & 4 Will. iv. c. 42, the executor or administrator may be sued for injury to property, real or personal, committed by the deceased within six months before his death; but the action must be brought within six months after the executor or administrator has taken on himself the administration of the estate; and damages recovered in such action are payable in like order of administration as the simple contract debts of the deceased (see *Kirk v. Todd*, 1882, 21 Ch. D. 484; *Phillips v. Homfray*, 1883, 24 Ch. D. 439). As to the liability of the personal representative of a deceased incumbent for dilapidations, see 34 & 35 Vict. c. 43 (and see *In re Monk*, 1887, 35 Ch. D. 583). Mis-cultivation of glebe land is not a dilapidation for which the executor of a deceased incumbent is liable at the suit of the successor (*Bird v. Relph*, 1833, 4 Barn. & Adol. 826; and see DILAPIDATIONS, ECCLESIASTICAL; GLEBE; and INCUMBENT). If a sole defendant dies before judgment, and there is a transmission of liability, his personal representative may be made a party under R. S. C., Order 17, r. 4. If one of several defendants on a joint cause of action dies before judgment, the survivor will be chargeable alone; but if the contract were several, or joint and several, the executor may be separately sued. In the case of partners, however, every partner is liable jointly with the others for all debts and liabilities incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration, but subject to the prior payment of his separate debts (the Partnership Act, 1890, 53 & 54 Vict. c. 39, s. 9; and see *Kendall v. Hamilton*, 1879, 4 App. Cas. 504, 517; and as to liability of the deceased's estate where the business is continued in the old firm-name, see sec. 14 (2) of the Act). Upon the death of a shareholder in a company, his right and liability as a member devolve upon his personal representative, whose liability is limited to the assets, so long as he does not himself become a shareholder by taking a transfer into his own name (see *Buchan's case*, 1879, 4 App. Cas. 549, 588). The representative of an original lessee is liable for breaches of covenant after assignment by the testator or himself; but if the testator was an assign of the lessee, future liability may be discharged by assignment over (and see 22 & 23 Vict. c. 35, s. 27). Since Locke King's Act (40 & 41 Vict. c. 34) the executor or administrator of a purchaser of real estate who dies before payment of the purchase money is not liable to complete the purchase, but the devisee takes the land charged with the purchase money, unless the testator or intestate has expressed a contrary intention. In the case of the vendor's death, the unpaid purchase money devolves as personal estate, and the personal representative can give effect to the contract by conveying the land contracted to be sold (Conveyancing Act, 1881, s. 4; and see *Lysaght v. Edwards*, 1876, 2 Ch. D. 499, 507; *In re Colling*, 1886, 32 Ch. D. 333). A legatee of a specific legacy charged by the testator is entitled to have it redeemed or freed by the executor; but, in general, the legatee of a leasehold interest takes it subject to the liabilities attaching to it, except as to a burden within Locke King's Act (and see *Bothamley v. Sherson*, 1875, L. R. 20 Eq. 304, 316). An executor cannot be compelled to complete an imperfect gift of his testator. As to claims against the estate of a

deceased person, there is no rule of law which precludes a claimant from recovering on his own testimony without corroboration; but the Court will, in general, require such corroboration (*In re Hodgey*, 1885, 31 Ch. D. 177). A guarantee, the consideration for which is given once for all, does not cease on the guarantor's death (*Lloyd's v. Harper*, 1880, 16 Ch. D. 290; as to continuing guarantees in respect of a firm, see the Partnership Act, 1890, s. 18).

(b) *For their own Acts*.—A promise by the representative to pay a debt of the testator or intestate out of his own estate is invalid unless it be in writing and there be sufficient consideration to support it. Forbearance to sue, or the having or admitting assets, may be sufficient consideration. The representative is also personally liable for the reasonable expenses, if he gives or ratifies an order for the funeral, and in any case, in the absence of evidence to charge any other person, he is liable, if he has assets (and see *Sharp v. Lush*, 1879, 10 Ch. D. 468, 472; *Williams v. Williams*, 1882, 20 Ch. D. 659). An executor has no authority in law to carry on his testator's trade, and if he does so without the protection of the Court, he will, on failure of assets, be personally liable for the debts contracted since the testator's death (*Ex parte Garland*, 1804, 10 Ves. 119; 7 R. R. 352; *In re Johnson*, 1880, 15 Ch. D. 548). Where the executor carries on the business with the assent, either express or implied, of the testator's creditors, he is entitled, in priority to them, to be indemnified out of the estate against liabilities properly incurred in so doing (*Dowse v. Gorton*, [1891] App. Cas. 190); and this principle is applicable where a receiver and manager has been appointed in an administration action to carry on the business in succession to the executor, and whether the will does or does not contain a power to carry on (*In re Brooke*, [1894] 2 Ch. 600). The testator's estate will not be liable in case of the bankruptcy of an executor who trades with the assets without authority from the will (*Ex parte Garland*, 1804, 10 Ves. 110). But the executor is bound to continue a business so far as required to complete his testator's contract, or with a view to a sale of works as a going concern. It is no part of an executor's duties to inquire into transactions of his testator twenty years before his death (*Alliott v. Smith*, [1895] 2 Ch. 111). An executor whose act puts his co-executor into sole possession of assets, is liable for misapplication if the act was unnecessary, which it will not be if done in the regular course of business (*In re Gasquoin*, [1894] 1 Ch. 470). Counsel's advice will not protect the personal representative from liability for his wrongful acts (*Peers v. Ceeley*, 1852, 15 Beav. 211), but it may relieve him from costs (*Angier v. Stannard*, 1835, 3 Myl. & K. 566; *Derey v. Thornton*, 1851, 9 Hare, 232; and see the Judicial Trustees Act, 1896, ss. 1 (2) and 3). An executor or administrator is liable to replace funds paid to a person who is not entitled, with interest at 4 per cent.; but he is not liable for interest to the legatee to whom, with full knowledge on his part and in common mistake, the erroneous payment has been made (*In re Hulkes*, 1886, 33 Ch. D. 552). He is not liable for acting or paying money in good faith under or in pursuance of a power of attorney, by reason of the fact that at the time of the payment or act the person who gave the power was dead or had done some act to avoid the power, if the fact was unknown to him (the Trustee Act, 1893, s. 23; and see the Conveyancing Act, 1882, ss. 8, 9).

Devastavit.—A wasting of the deceased's assets by an executor or administrator is called in law a *devastavit*, for which he is personally liable, as far as he had, or might have had, assets of the deceased (Bac. Abr. "Executors" (1)1). Where an executor accepts the office, he becomes a trustee

in the sense that he is personally liable in equity for the ordinary trusts which, in Courts of equity, are considered to arise from his office (*In re Marsden*, 1884, 26 Ch. D. 783, 789, quoting from Williams, *Executors and Administrators*, 8th ed., p. 1803; 9th ed., p. 1691). A *devastavit* may be committed by direct act, as by conversion of the assets to the executor's own use, or sale at an undervalue, or by maladministration, as by an unduly expensive funeral, paying debts out of their legal order, or payment of legacies to the prejudice of creditors. Before distribution of the assets among the persons entitled thereto, an executor or administrator can protect himself by issuing proper notices for creditors and others to send in their claims against the deceased's estate (see 22 & 23 Vict. c. 35, s. 29; and see R. S. C., Order 55, rr. 44-61). Further protection has been afforded to executors and administrators by the Judicial Trustees Act, 1896, 59 & 60 Vict. c. 35, s. 3, which enables the Court to relieve a trustee (which expression includes an executor or administrator) from personal liability for a breach of trust, where he has acted honestly and reasonably, and ought fairly to be excused. This section applies to the case of an executor who has committed a *devastavit*, but the Court is bound to see that there has been no undue delay in advertising for claims (*In re Kay, Mosley v. Kay*, [1897] 2 Ch. 518). By the Conveyancing Act, 1881, s. 37, extensive powers of compromising and settling debts and claims were given to executors and trustees, but the section did not apply to administrators (*In re Clay and Tetley*, 1880, 16 Ch. D. 3). These provisions replaced the similar powers given by Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 30, and have been themselves repealed by the Trustee Act, 1893, and re-enacted so as to extend to administrators, and to all executorships, administratorships, and trusts constituted or created either before or after the commencement of the Act (January 1, 1894; see ss. 21, 54). A *devastavit* is committed by payments which the executor is not bound to make; but as a general rule he may pay a statute-barred debt, and is not bound to plead the statute as a defence; but he may not make such payment if the debt has been judicially declared to be statute-barred, and it seems he ought not to do so against the declared wish of his co-executor (*Midgley v. Midgley*, [1893] 3 Ch. 382); and an executor may in like manner retain his own statute-barred debt, but it is a *devastavit* to pay or retain a debt barred by the Statute of Frauds. After an order for administration the executor's discretion is at an end, and under an originating summons (see R. S. C., Order 55, r. 3) the parties are in the same position as if an administration decree had been made under the former practice, and a residuary legatee may compel the executor to set up the Statute of Limitations as a defence to a claim (*In re Wenham*, [1892] 3 Ch. 59). Negligence in not paying debts carrying interest, or in not getting in debts due to the estate, may amount to a *devastavit*. Under the equity rule, which now prevails in the High Court, an executor is a gratuitous bailee, and cannot be charged with assets stolen or lost by casualty, without some wilful default on his part (*Job v. Job*, 1877, 6 Ch. D. 562). A *devastavit* may also result (1) from an improper investment; it is the duty of an executor to invest assets, not otherwise required, in authorised investments, and if he does so he will not be responsible for any fall in value. A trustee (which expression includes the duties incident to the office of personal representative of a deceased person) may, unless expressly forbidden by the instrument creating the trust, invest in the manner specified in sec. 1 of the Trustee Act, 1893 (see the definition of "trust" and "trustee" in sec. 50, and see also secs. 2-9); (2) from the non-conversion of property bequeathed for life with remainder

over (see *Howe v. Lord Dartmouth*, 1802, 7 Ves. 137; 6 R. R. 96); (3) from not calling in money on improper or unauthorised securities, or in the hands of a banker; but where the executor has exercised an honest discretion as to conversion under difficult circumstances, he will not be liable for loss from not having sold within a year of the testator's death (*Marsden v. Kent*, 1877, 5 Ch. D. 598); (4) from the default of agents employed by the executor; but when a broker or other agent is employed in the usual and regular course of business adopted in similar circumstances by ordinary prudent men, the executor will not be liable without misconduct or default on his part (*Speight v. Gaunt*, 1883, 9 App. Cas. 1), and he will not be answerable or accountable for any banker, broker, or other person with whom moneys or securities may be deposited, unless a loss happens through his own wilful default (Trustee Act, 1893, s. 24, and see s. 17; *Robinson v. Harkin*, [1896] 2 Ch. 415; and see generally as to the liability of executors for loss of assets the judgment of Lord Cottenham in *Clough v. Bond*, 1838, 3 Myl. & Cr. 490, 496). An executor or administrator may appoint a solicitor as his agent to receive money on the production of a deed containing any such receipt as is referred to in sec. 56 of the Conveyancing Act, 1881 (Trustee Act, 1893, s. 17 (1); and see *In re Helling v. Merton*, [1893] 3 Ch. 269).

Where there are several executors, a *devastavit* by one will not charge the other, unless he has intentionally or otherwise contributed to it (Cro. (1) 319); but where by the act of one assets come to the hands of the other, the one will be answerable for the other, as he would have been for a stranger, unless it is a case covered by the protection above stated with reference to bankers, brokers, or other agents properly employed (see *Chambers v. Minchin*, 1802, 7 Ves. 186, 198; 6 R. R. 111; *Bacon v. Bacon*, 1800, 5 Ves. 331; 5 R. R. 52). But an executor who stands by and sees a breach of trust committed by his co-executor will be liable for the consequences, and the usual indemnity clause will not protect him. An executor is, in the absence of express provision in the will, chargeable only for money or securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and is answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of his co-executor, unless a loss happens through his own wilful default (Trustee Act, 1893, s. 24). An executor may be liable for a *devastavit* although he renounces probate, if he acts in the administration of the assets otherwise than as a mere agent of the acting executor.

An executor may be released from his liability for a *devastavit* by the concurrence or acquiescence of the person injured thereby; and under the Trustee Act, 1893, s. 45, the Court has power to make an order by way of indemnity to an executor or administrator who has committed a breach of trust at the instigation or request, or with the consent in writing (see *Griffith v. Hughes*, [1892] 3 Ch. 105) of a beneficiary, including a married woman entitled for her separate use and restrained from anticipation (see *In re Somersct*, [1894] 1 Ch. 231; *Mara v. Browne*, [1895] 2 Ch. 69; [1896] 1 Ch. 199).

Since the Married Women's Property Act, 1882, a married woman is capable of rendering herself liable to the extent of her separate property on any contract, and of suing and being sued in contract as if she were a *feme sole* (s. 1 (2)), and "contract" includes the acceptance of the office of executrix or administratrix, and the provisions of the Act as to liabilities of married women extend to liabilities by reason of a *devastavit* committed by her as an executrix or administratrix, either before or after her marriage,

and her husband is not liable unless he has acted or intermeddled in the administration (s. 24, and see ss. 18 and 23).

A *devastavit* is within the Statute of Limitations, 21 Jac. I. c. 16, and an executor sued by a creditor of the testator for a *devastavit* can plead the statute (*Thorne v. Kerr*, 1855, 2 Kay & J. 54; *In re Gale*, 1883, 22 Ch. D. 820); but, at equity as in law, when an executor is sued as such for a liability of the testator, he cannot set up his own *devastavit* as a defence, so as to avail himself of the statute (*In re Marsden*, 1884, 26 Ch. D. 783; *In re Hyatt*, 1888, 38 Ch. D. 609).

Accounts.—An executor or administrator must account for all profits accruing to the deceased's estate. Where he employs the assets in trade for his own benefit, the beneficiaries are entitled to interest at 5 per cent. on the assets, or to the actual profits, at their option; and surviving partners who are the deceased partner's executors and employ his assets in the business must account for the profits so made (see *Vyse v. Foster*, 1874, L. R. 7 H. L. 318). As a general rule, an executor cannot purchase part of the assets for himself, but must account for any profit made as a trustee; and he will be responsible for any loss occasioned by a breach of trust, but must account for any gain.

An executor or administrator may be charged with interest—(1) if he unreasonably neglects to invest moneys in his hands—the rate of interest will not be more than 4 per cent., except in special circumstances; (2) where he improperly uses assets for his own benefit, and the rate will be 5 per cent., unless the *cestui-que trust* elects to take the actual profits (see *Jones v. Foxall*, 1852, 15 Beav. 388; *Williams v. Powell*, *ibid.* 461; *Mayor of Berwick v. Murray*, 1857, 7 De G., M. & G. 497; and *Burdick v. Garrick*, 1870, L. R. 5 Ch. 233). Simple interest will generally be charged, but compound interest may be directed in special instances.

Allowances.—An executor or administrator is entitled to be allowed all reasonable expenses incurred by him as such, but not for personal trouble and loss of time; and if he is a solicitor, he will be entitled to costs out of pocket only, unless expressly authorised by the will to receive profit costs, except where he acts in a suit for himself and his co-trustees (see *Cradock v. Piper*, 1849, 17 Sim. 41; *Broughton v. Broughton*, 1855, 5 De G., M. & G. 160; *In re Barber*, 1886, 34 Ch. D. 77; *In re Corsellis*, 1887, 34 Ch. D. 675). Similarly, an agent who is his principal's executor cannot in general charge commission against the estate. An executor will be allowed the expenses of employing an agent, accountant, or solicitor, in proper cases, but not the charges of a solicitor for doing work which the executor ought to do himself (and see, as to a solicitor trustee, *Harbin v. Darby*, 1860, 28 Beav. 325; *In re Chapple*, 1884, 27 Ch. D. 584). In taking any account directed by any judgment or order, all just allowances are to be made without any direction for that purpose (R. S. C., Order 33, r. 8; and see Daniell, *Chancery Practice*, 6th ed., 1054–1060).

Actions by or against Executors or Administrators.—If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement of the claim must show in what capacity he sues or is sued (R. S. C., Order 3, r. 4). Executors or administrators may sue and be sued on behalf of or as representing the property or estate of which they are representatives, without joining any of the persons beneficially interested, and will be considered as representing such persons; but the Court or a judge may at any stage of the proceedings order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties; and this rule applies to executors and

administrators sued in proceedings to enforce a security by foreclosure or otherwise (R. S. C., Order 16, r. 8). Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (R. S. C., Order 18, r. 5). If there are several executors or administrators, all must join in bringing actions but an executor who has not proved, need not be made a party, although he has not renounced, unless he has acted. Where one of co-executors refuses to join as plaintiff, the other can sue, making him a defendant. An executor out of the jurisdiction, or a renouncing or absconding executor, is not a necessary party (see *Drage v. Hartopp*, 1885, 28 Ch. D. 414). An executor or administrator cannot sue *in forma pauperis* (*Oldfield v. Cobbett*, 1845, 1 Ph. 615). An executor or administrator can sue before probate or grant of administration, but must obtain them before the hearing. Special remedies are given to executors and administrators by originating summons for the determination, without an administration of the estate, of certain questions or matters arising in the administration (see R. S. C., Order 55, r. 3). Under this rule there is jurisdiction to determine such questions only as before the rule could have been determined under a judgment for administration (*In re William Davies*, 1888, 38 Ch. D. 210; *In re Royle*, 1889, 43 Ch. D. 18; and see *In re Hargreaves*, 1890, 43 Ch. D. 401). The issue of the summons does not interfere with or control any power or discretion vested in the executor or administrator, except so far as necessarily involved in the relief sought (Order 55, r. 12). Under rule 4 of Order 55 the Court can, on originating summons, order the administration of the real and personal estate of the deceased, or either. (As to service of the summons under rr. 3 and 4, see Order 55, r. 5; and as to the practice introduced by the above provisions, see *In re Wilson*, 1885, 28 Ch. D. 457, 460; and ADMINISTRATION ACTION.) The Court or a judge is not now bound to make a judgment or order, on summons or otherwise, for administration, if the questions between the parties can be properly determined without (Order 55, r. 10), and this provision applies to administration actions commenced before, but tried after, the rule came into operation, and the question whether general administration is necessary can be referred to chambers (*In re Llewellyn*, 1883, 25 Ch. D. 66). General administration will be directed where without it the executors or administrators will not be adequately protected. A direction in the will to obtain general administration does not deprive the Court of its discretion (*In re Stocken*, 1888, 38 Ch. D. 319). The judge in person alone can make an order for general administration (Order 55, r. 15 *a*). No action lies at law against an executor for a general legacy, or against an administrator for a distributive share of an intestate's property, although he may have expressly promised to pay; but a specific legatee can sue at law after the executor's assent. But a Court of equity regards executors and administrators as trustees, and will compel them to apply the assets in a due course of administration, and will order payment of a personal legacy, or distribution of an intestate's estate, and an account of the assets and the application of them. In case of misconduct or waste of assets by the executor or administrator, the Court will appoint a receiver; but will not make the appointment so as to interfere with the executor's right of retainer (*In re Wells*, 1890, 45 Ch. D. 569). Any balance which the executor admits to be in his hands may be ordered into Court, notwithstanding there are demands on it to which he is liable (*Daniell, Chancery*

Practice, 6th ed., 1734); but the order will not prejudice his right of retainer or lien for costs.

Administration Action.—See generally this heading, *ante*, vol. i. The action may be commenced by writ, or by originating summons under R. S. C., Order 55, rr. 3, 4. A creditor whose debt depends on disputed facts cannot obtain an order on summons (*In re Powers*, 1883, 30 Ch. D. 291). Proceedings before probate or grant of administration must be by writ (*In re Leask*, 1891, W. N. 159). A creditor, or legatee, may sue on behalf of himself and other creditors, or legatees (and see *In re Greaves*, *Bray v. Toftfield*, 1881, 18 Ch. D. 551, 554; *In re McRea*, 1886, 32 Ch. D. 613, 615). Where an order has been made, a second action will be stayed, unless it asks more complete and beneficial relief, or raises questions of wilful default or breach of trust. An order for administration cannot be made in the absence of a personal representative (*Dowdeswell v. Dowdeswell*, 1878, 9 Ch. D. 294). Under the former practice the executor of a deceased representative was properly joined as a co-defendant with the continuing representative, and he was a necessary party when an account on the footing of wilful default was claimed (*Coppard v. Allen*, 1864, 2 De G., J. & S. 173); but in an action for a general account against a surviving executor and trustee, it is not, generally, necessary for the plaintiff to make the representative of a deceased trustee or executor a party (*In re Harrison*, [1891] 2 Ch. 349). The administrator of a deceased executor does not sufficiently represent the estate for the purpose of an administration decree, nor, it seems, an executor *de son tort* (*Russell v. Morris*, 1873, L. R. 17 Eq. 20; but see *In re Lovett*, 1876, 3 Ch. D. 198), nor an administrator *ad litem* (*Dowdeswell v. Dowdeswell*, *ubi supra*).

Executors or Administrators abroad.—An executor or administrator can be sued in his official capacity only in the country where he has obtained his authority to act as such (Story, *Conflict of Laws*, ch. xiii. s. 513). Hence, where there is only a foreign executor or administrator, and a creditor wishes to sue here in respect of English assets, an English personal representative must be properly constituted for the purpose of such action (and see *Tyler v. Bell*, 1837, 2 Myl. & Cr. 89, 110). Where a person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction, the Court may allow service of a writ of summons, or notice of it, out of the jurisdiction (R. S. C., Order 11, 1 (g)); for instances in actions against executors or administrators, see *In re Lanc*, 1866, 55 L. T. 149; *Harvey v. Dougherty*, 1887, 56 L. T. 322; *In re De Penny*, [1891] 2 Ch. 63). Service out of the jurisdiction may also be allowed where the action is for the administration of the personal estate of a deceased person domiciled at his death within the jurisdiction (see *In re Eager*, 1882, 22 Ch. D. 86; *Wood v. Middleton*, [1897] 1 Ch. 151).

Wilful Default.—An executor or administrator is in the position of a gratuitous bailee who cannot be charged with the loss of his testator's assets without wilful default (*Job v. Job*, 1877, 6 Ch. D. 562). Under the usual administration order an executor or administrator can be charged only for actual receipt by himself or his agent, not for a default of a co-executor or co-administrator; and it is not the practice to direct executors, etc., to account for what they might, but for their own default, have received. For such an inquiry the plaintiff must aver and prove at least one act of wilful default (*In re Youngs*, 1885, 30 Ch. D. 421). Where the statement of claim alleges wilful default, an order on that footing may be made at any stage of the proceedings (*In re Symons*, 1882, 21 Ch. D. 757; *Job v. Job*, *ubi*

supra; *Mayer v. Murray*, 1878, 8 Ch. D. 424). Leave of the Court must be obtained to maintain an action against a defendant on the footing of wilful default, where the common administration order has been previously obtained (*Laming v. Gee*, 1878, 10 Ch. D. 715). Where there are no pleadings, the charge can be raised by affidavit (*Barber v. Mackrell*, 1879, 12 Ch. D. 534). The charge must be proved at the hearing; the plaintiff has no right to postpone the question to a later stage (*Smith v. Armitage*, 1883, 24 Ch. D. 727). The burden of proof is on the charging party (*In re Brier*, 1884, 26 Ch. D. 238). Particulars should be given in the pleading (*In re Anstice*, 1885, 54 L. J. Ch. 1104; and see Order 19, r. 6). Accounts on the footing of wilful default cannot be obtained under R. S. C., Order 15 (*In re Bowen*, 1882, 20 Ch. D. 538). Upon an originating summons under Order 55, rr. 3, 4, an order for inquiries on the footing of wilful default cannot be obtained otherwise than by consent (*Dowse v. Gorton*, [1891] App. Cas. 190, 202).

Receiver against Executor.—The Judicature Act, 1873, gives the Court power to appoint a receiver in all cases where it appears just or convenient that such order should be made (s. 25 (8)); but the principles which obtained under the former practice still prevail. A receiver will be appointed against an executor where there is gross misconduct or personal disability on his part, but not merely because he is in poor circumstances, unless there is danger of misapplication of the assets; but it will in general be made where he is a bankrupt or insolvent (Williams, *Executors*, 9th ed., p. 187; Seton, *Judgments and Orders*, 5th ed., p. 659). The Court has jurisdiction to restrain an executor who has become bankrupt since the death of the testator from further acting; and if there is a co-executor willing to continue to act, will not require the appointment of a receiver (*Bowen v. Phillips*, [1897] 1 Ch. 174). An omission to get in the estate, and allowing arrears of rent to accrue, are grounds for the appointment of a receiver (*Richards v. Perkins*, 1838, 3 Y. & C. Ex. 299; *Hart v. Talk*, 1849, 6 Hare, 611); but not the executor's power of preferring creditors or retaining his own debt (*Harris v. Harris*, 1887, 56 L. J. Ch. 754; *In re Wells, Molony v. Brooke*, 1890, 45 Ch. D. 569). Absence of the sole executor out of the jurisdiction, danger of the assets being removed out of the jurisdiction, refusal of sole executor to act after probate, are also grounds for the appointment of a receiver. An executor and administrator is not usually appointed receiver of his trust estate (——— v. *Jolland*, 1802, 8 Ves. 72; *Sutton v. Jones*, 1809, 15 Ves. 584, 587).

No Legal Personal Representative.—If in any cause, matter, or other proceeding it appears to the Court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or proceeding on such notice to such persons (if any) as the Court or judge thinks fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, will bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party (R. S. C., Order 16, r. 46, adapted from the Chancery Procedure Act, 15 & 16 Vict. c. 86, s. 44). A person appointed under these provisions does not sufficiently represent the estate in an action for general administration of the deceased's estate (*Dowdswell v. Dowdswell*, 1878, 9 Ch. D. 294; and see *Groves v. Lane*, 1852, 16 Jur. 1061); nor where the interest of the deceased is adverse

to that of the plaintiff; nor where the representative of the deceased has active duties to perform (*Moore v. Morris*, 1871, L. R. 13 Eq. 139, 140). For cases in which a personal representative was dispensed with, see *Crossley v. City of Glasgow Life Assurance Society*, 1876, 4 Ch. D. 421; *Curtius v. Caledonian Fire and Life Insurance Co.*, 1881, 19 Ch. D. 534; and see Daniell, *Chancery Practice*, 6th ed., 209. Where a sole plaintiff died insolvent and intestate, a person was appointed to represent his estate against whom the defendant might move for dismissal of the action (*Wingrove v. Thompson*, 1879, 11 Ch. D. 419). The Court will protect the estate until a personal representative has been constituted by appointing a receiver (see 1 Seton, 5th ed., pp. 636, 637). Except under special circumstances, the application should be made to the Probate Division (*In re Parker*, 1885, 54 L. J. Ch. 694; *In the goods of Moore*, 1888, 13 P. D. 36). Where an order is made under the above provisions, it should appear on the face of it, to render it binding on the estate of the deceased person, either that the Court, having had its attention called to this point, has dispensed with the legal personal representative of the deceased person interested in the matter, or has appointed some person to represent the estate (*In re Richerson*, [1893] 3 Ch. 146).

Payment into Court.—In the Trustee Act, 1893, the expressions “trust” and “trustee” include the duties incident to the office of personal representative of a deceased person (s. 50). By sec. 42, trustees, or the majority of trustees, having in their hands, or under their control, money or securities belonging to a trust, may pay the same into the High Court, and the same will, subject to rules of Court, be dealt with according to the orders of the Court. The receipt of the proper officer is a sufficient discharge. The Court may order payment in by a majority of trustees desirous of paying in, where the concurrence of the others cannot be obtained, and for that purpose may order payment or delivery of the moneys or securities to the majority by any banker, broker, or other depository (and see R. S. C., Order 54 B, as to proceedings under this Act, which are assigned to the Chancery Division). The Act repealed the Trustee Relief Acts (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74) and sec. 32 of the Legacy Duty Act (36 Geo. III. c. 52) relating to legacies to infants and persons beyond seas. As the direction of the Court can now be obtained quickly and cheaply under R. S. C., Order 55, r. 3, trustees should not, in general, pay into Court, but take out an originating summons (see *In re Giles*, 1886, 55 L. J. Ch. 695; 34 W. R. 712). Payment into Court deprives a trustee of the capacity to exercise any power or discretion which he had as to the fund (*In re Nettlefold's Trusts*, 1888, W. N. 120).

Close of Office of Representative.—When the duties of an executor have been completely discharged, he may become a trustee; but where the residue has not been ascertained, he cannot be considered a trustee of a specified fund (*Lord Brougham v. Lord W. Poulett*, 1854, 19 Beav. 119, 134; and see *Wilcott v. Jenkins*, 1838, 1 Beav. 401, 405). But where he has severed and appropriated a trust legacy, or where, after full administration, he retains a legacy in his hands, not as assets, but as trustee, he is no longer executor, but trustee of the legacy (*Phillipo v. Munnings*, 1837, 2 Myl. & Cr. 309, 315; *Byrchall v. Bradford*, 1822, 6 Madd. 235, 240; 23 R. R. 204); and so where he has purchased stock to answer an annuity (*Ex parte Dover*, 1834, 5 Sim. 500), or invested the residue on the trusts of the will (*Ex parte Wilkinson*, 1837, 3 Mont. & A. 145). Where the residue of, an estate, bequeathed to an infant, has been ascertained, the executor is trustee of it for the infant, and may apply the income for maintenance (*In re*

Smith, 1889, 42 Ch. D. 302). As to when there is or is not an express trust, see *In re Sirain*, [1891] 3 Ch. 233; *In re Barker*, [1892] 2 Ch. 419. An administrator with the will annexed is not trustee of the will, except as holding the assets after administration with notice of a trust. It is the practice to give an executor or administrator a formal release when the estate has been wound up, but not when the accounts have been taken by the Court.

Appointment of New Trustees.—Under sec. 10 of the Trustee Act, 1893, where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person able and willing to act, then the surviving or continuing trustees for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint a new trustee or new trustees. The personal representative of a deceased trustee is not bound to appoint a new trustee (*In re Scott's Knight's Will*, 1883, 26 Ch. D. 82). The donee of the power may not appoint himself (*In re Skeat's Settlement*, 1889, 42 Ch. D. 522), either solely or jointly with other trustees (*In re Niven*, [1894] 2 Ch. 297). A sole surviving trustee of a will cannot appoint by his will special executors to be trustees of the original will in continuation to himself; and where probate had been granted to the general executors, they were held to be "personal representatives" for the purpose of appointing new trustees (*In re Parker's Trusts*, [1894] 1 Ch. 707). A trustee cannot be appointed to perform the duties of an executor; but where those duties have been performed, and the executor has become a trustee of the clear residue, a new trustee can be appointed (see *In re Moore*, 1882, 21 Ch. D. 778; *In re Willey*, 1893, W. N. 1; *Eaton v. Davies*, 1894, W. N. 32). The personal representative of the survivor of two trustees nominated by a will, but dying before the testator, cannot appoint new trustees of the will (*Nicholson v. Field*, [1893] 2 Ch. 511). The Court will not interfere with the legal power to appoint new trustees (*Tempest v. Lord Camoys*, 1882, 21 Ch. D. 571; *In re Gadd*, 1883, 23 Ch. D. 134; *In re Higginbottom*, [1892] 3 Ch. 132).

Vesting Orders.—Under the Lunacy Act, 1890, s. 136 (3), the judge in lunacy (see s. 108) is empowered to make an order vesting in any person or persons he may appoint the right to transfer or call for a transfer of stock standing in the name of a deceased person whose personal representative is a lunatic, or to receive the dividends thereof, or to sue for a chose in action vested in a lunatic as the personal representative of a deceased person, or may, if more convenient, appoint a proper person to make or join in making the transfer. The Trustee Act, 1893, empowers the High Court to make vesting orders as to land where a trustee entitled to or possessed of it, or entitled to a contingent right therein, either solely or jointly, is an infant, or out of the jurisdiction, or cannot be found; and where it is uncertain which of several trustees was the survivor, or whether the last trustee be living or dead; and where there is no heir or personal representative to a trustee dying intestate as to the land, or it is uncertain who is his heir or representative or devisee; and in case of the refusal or neglect of a trustee to convey or release land or a contingent right therein (s. 26). A vesting order may also be made where the heir or personal representative or devisee of a deceased mortgagee, the mortgage debt having been paid off, is out of

the jurisdiction or cannot be found, or refuses or neglects to convey, or it is uncertain which of several devisees was the survivor, or whether such survivor or the heir or personal representative is living or not; or where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died, and it is uncertain who is his heir or representative or devisee (s. 29). Vesting orders may also be made as to stock and choses in action (see s. 35). The expressions "trust" and "trustee" include the duties incident to the office of personal representative of a deceased person (s. 50). Instead of a vesting order, the Court may, if more convenient, appoint a person to convey the land, or release the contingent right, or to make or join in making the transfer of stock (see ss. 33, 35 (2)).

Statutes of Limitation.—Under sec. 8 of the Trustee Act, 1888, in any action or other proceeding against a trustee (which expression includes an executor or administrator, see s. 1 (3)) or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee and converted to his use, all rights and privileges conferred by a Statute of Limitation are to be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him. If the action or proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitation applies, the trustee or person claiming through him will be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession. The section does not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitation. For an example of a breach of trust to which no existing statute applied before the Act, and to which under the Act a lapse of six years was a good plea in bar, see *In re Swain*, [1891] 3 Ch. 233. Where a trustee or executor had expended the residue of an estate to which an infant was entitled on attaining twenty-one in his maintenance, but had rendered no account, a summons for administration taken out by the legatee more than six years after attaining his majority was dismissed (*In re Page*, [1893] 1 Ch. 304). The effect of the section is that any action to recover money or other property from trustees (being one to which no previously existing Statute of Limitation applies) must be brought within six years from the time when the right of recovery accrued (*In re Somerset*, [1894] 1 Ch. 231); and, except in the cases excepted in the Act, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions or proceedings for breaches of trust were enumerated in them (*How v. Earl Winterton*, [1896] 2 Ch. 626). As to when the statute begins to run as between co-trustees, see *Robinson v. Harkin*, [1896] 2 Ch. 415. If fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitation, it must be fraud of, or in some way imputable to, the person who invokes the aid of the statute (*Thorne v. Heard & Marsh*, [1895] App. Cas. 495).

Costs.—Subject to the provisions of the Judicature Acts and the Rules of Court, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the Court or judge; but the above provision is not to deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled in the Chancery Division (R. S. C., Order 65, r. 1). Previously to this rule, the costs of administration proceedings were not within the discretion of the Court, and they were included to check the old Chancery practice of giving costs out of the estate almost as a matter of course (see *In re Beddoe*, [1893] 1 Ch. 547, 554). "Charges and expenses" are not costs within this rule, and an appeal lies from an order dealing with them (*In re Cheenell*, 1878, 8 Ch. D. 492; *In re Beddoe*, *ubi supra*). Where the estate is insufficient, the executor is entitled to his costs, charges, and expenses in an administration action, in priority (*In re Middleton*, 1882, 19 Ch. D. 552, 556). The effect of the rule is to give the executor his costs in an administration action, unless he is found guilty of misconduct, as to which an appeal lies: if misconduct is established, the costs are in the discretion of the Court. Examples of misconduct are: withholding accounts (*In re Rudeloffe*, 1881, 50 L. J. Ch. 317); allowing a solicitor to retain unnecessary costs (*In re Weall*, 1889, 42 Ch. D. 674); bringing a useless administration action (*In re Cabburn*, 1882, 46 L. T. 848). No costs are given to an executor who is a debtor to the estate until the default is made good. If co-executors, one of whom is in default, appear separately, the one not in default gets his costs: if they appear together, the one not in default gets only his own costs out of the one set allowed, and apportionment must be made by the taxing-master (*Smith v. Dale*, 1881, 18 Ch. D. 516; and see, as to the executor of a defaulting executor, *In re Griffiths*, 1884, 26 Ch. D. 465). Where a defaulting executor becomes bankrupt after judgment, he is entitled to his costs subsequent to the bankruptcy without making good his default, but the prior costs are set off against the debt (*In re Basham*, 1882, 23 Ch. D. 195; *In re Fowles*, 1886, 32 Ch. D. 243; and see the Bankruptcy Act, 1883, s. 30). An administrator acting *bonâ fide* was allowed his costs out of the estate, although the grant was afterwards revoked and a will was proved (*Mirchouse v. Herbert*, 1857, 5 W. R. 583); but an administrator whose letters are revoked will not get his costs of an administration action brought by him with knowledge of another's claim to administer (*Houseman v. Houseman*, 1876, 1 Ch. D. 535). An administrator is entitled to his costs of an administration action although caused by his claim for allowance of payments made by him out of the estate and subsequently disallowed, provided the claim was *bonâ fide*, and neither fraudulent nor monstrous (*In re Jones*, [1897] 2 Ch. 190). Where there has been no misconduct, the representative is entitled to costs as between solicitor and client (see *In re Lorr*, 1885, 29 Ch. D. 348). As to the costs of probate litigation, payable out of personal estate only, see *Charter v. Charter*, 1876, 3 Ch. D. 218. As between the representative and third persons, the ordinary rule as to costs, which throws them on the unsuccessful party, will prevail (see Morgan and Wurtzburg, *Costs*, pp. 396-416; and see *supra*, vol. iii., *COSTS*).

Charges and Expenses.—Examples of payments allowed as such are: costs of an action properly defended (*Walters v. Woodbridge*, 1878, 7 Ch. D. 504; *In re Llewellyn*, 1887, 37 Ch. D. 317, 327); of a sale properly made under a power (*In re Mansel*, 1885, 54 L. J. Ch. 883); of proceedings against a defaulting solicitor (*In re Davis*, 1887, 57 L. T. 755). An appeal

lies from an order allowing charges and expenses out of a fund (*In re Chennell*, 1878, 8 Ch. D. 492; *In re Beddoe*, [1893] 1 Ch. 547).

Solicitor-Trustee.—Unless expressly authorised by the will, a solicitor thereby appointed executor or trustee is entitled to charge only costs and expenses out of pocket, properly incurred; and although empowered to make professional charges, he cannot charge for services not strictly professional, and which any executor ought to do without employing a solicitor (*Harbin v. Darby*, 1860, 28 Beav. 325); but he may be expressly authorised to do so (*In re Ames*, 1883, 25 Ch. D. 72; and cp. *In re Chapple*, 1884, 27 Ch. D. 584). Such an authority should not be inserted by the solicitor-executor preparing the will, without express instructions (*In re Chapple, ubi supra*). If the solicitor attests the will, the power is inoperative, under sec. 15 of the Wills Act (*In re Barber*, 1886, 31 Ch. D. 665; *In re Pooley*, 1888, 40 Ch. D. 1). But where work is done in an action on behalf of the solicitor-trustee and a co-trustee, the usual costs will be allowed to the solicitor or his firm, if the costs have not been increased by the solicitor appearing and acting for both (*Cradock v. Piper*, 1850, 1 Mac. & G. 664; *In re Barber*, 1887, 34 Ch. D. 77; *In re Corsellis*, 1887, 34 Ch. D. 675).

Remedies in Probate Division.—The Probate Division has power to compel an executor or administrator to exhibit an inventory or render an account on the application of a legatee, next-of-kin, or creditor; but cannot cite him *ex officio* to account (see *Bourcier v. Macwell*, 1866, L. R. 1 P. & D. 272). The application is made by summons. The reasonable expenses of an executor or administrator will be allowed in the Probate Division, which will generally follow the authorities in this respect which hold good in the Chancery Division. The Probate Division cannot entertain a suit for payment of a legacy or distribution of a residue (Court of Probate Act, 20 & 21 Vict. c. 77, s. 23); but it has, in common with the other Divisions, power to appoint receivers and grant injunctions (Jud. Act, 1873, s. 25 (8); and see *In the goods of Moore*, 1888, 13 P. D. 36).

County Court Jurisdiction.—Under the County Courts Act, 1888 (51 & 52 Vict. c. 43), the County Courts have and may exercise all the powers and authority of the High Court in actions or matters by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next-of-kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made does not exceed in amount or value £500; or under the Trustees Relief Acts or Trustee Acts (now replaced by the Trustee Act, 1893), in which the trust estate or fund to which the action or matter relates does not exceed in amount or value £500. In such actions or matters the County Court judge has all the powers and authorities, for the purposes of the Act, of a judge of the Chancery Division (s. 67). Where the amount of the subject-matter of the action or matter exceeds the limit, the proceedings must be transferred to the Chancery Division. Power is also given to a judge of the Chancery Division to transfer to the County Court an action or matter which might have been commenced there (s. 69); and to trustees, executors, or administrators, to pay or transfer trust moneys or securities into the County Court, when not exceeding in amount or value £500. Proceedings may be taken in the County Court, corresponding to those by originating summons in the Chancery Division (under R. S. C., Order 55, r. 3), for the determination of questions or matters arising in the administration of the estate or trust, without an order for general administration (County Court Rules, 1889, Order 6, r. 6); and the judge at the trial may make an order determining any question or matter submitted pursuant to the above

provisions in any action for administration or for the execution of trusts, without making an order for the general administration of the estate or execution of the trusts (Order 22, r. 11). See generally, Thomson, *Principles of Equity and Equity Practice of the County Court*.

Administration in Bankruptcy.—Sec. 125 of the Bankruptcy Act, 1893, provides for the administration in bankruptcy of the estate of a deceased insolvent. Where proceedings have been commenced in any Court for the administration of the estate of a deceased debtor, such Court can, on proof that the estate is insolvent, transfer the proceedings to the Court of Bankruptcy. The transfer may be made either on the application of a creditor or without it (see the Bankruptcy Act, 1890, s. 21 (2)). The power of transfer is discretionary, and not one which the judge is bound to exercise whenever the estate is shown to be insolvent; and the circumstance that the executor has a right of retainer and a liberty not to plead the Statute of Limitation to a debt, which rights might be taken away by a transfer, is not a ground for making it (*In re Baker*, 1890, 44 Ch. D. 262). Any creditor of the deceased whose debt would have been sufficient to support a bankruptcy petition against him, may petition the Court of Bankruptcy for administration of his estate according to the law of bankruptcy; and the order may be made, on notice to the legal personal representative, unless the Court is satisfied that the estate is solvent. The order may be made upon a petition served before probate or letters of administration, if, at the time of the making of it, there is a duly constituted legal personal representative before the Court (*In re Sleet*, [1894] 2 Q. B. 797). In the administration under such an order the official receiver (in whom the debtor's property vests as trustee thereof, s. 125 (5)) is to have regard to any claim by the personal representative to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims are to be deemed a preferential debt under the order, and be payable in full out of the estate in priority to all other debts (s. 125 (7)); and he is to pay over to the personal representative any surplus which may remain after payment in full of all the debts of the deceased, together with the costs of administration and interest as provided by the Act (s. 125 (8)). Notice to the personal representative of a creditor's petition under sec. 125 is, if an order is made thereon, equivalent to an act of bankruptcy, and after it no payment or transfer of property by the representative operates as a discharge as between him and the official receiver; but otherwise no payment made or act or thing done in good faith by the representative before the order will be invalidated (s. 125 (9)). As to the application of Part III. of the Bankruptcy Act, 1883, to an administration of a deceased debtor's estate under sec. 125, see *Watkins v. Barnard*, [1897] 2 Q. B. 521.

Debtors Act.—One of the exceptions contained in the Debtors Act (*q.v.*), 1869, to the abolition of arrest or imprisonment for making default in payment of a sum of money is (see s. 4 (3)) default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of equity any sum in his possession or under his control (as to the practice, see R. S. C., Order 69). Under the present practice, it seems, the writ of *ne credat regno* is not to be issued except in cases which come within the provisions of sec. 6 of the Debtors Act, 1869 (*Drover v. Bygrr*, 1879, 13 Ch. D. 242; *Hunds v. Hands*, 1881, 43 L. T. 750), which gives power under certain circumstances to arrest a defendant about to quit England. The exercise of the power of arrest is discretionary. The debt in respect of which the writ is sought must be due and payable and for an ascertained amount (*Colverson v. Bloomfield*, 1885, 29 Ch. D. 341). The debt and the intention to leave the country (*Perry v. Dorset*, 1871, 19 W. R. 1048), and the prejudicial effect which

would result therefrom to the plaintiff (*Drover v. Beyer, ubi supra*), must be clearly proved.

Judicial Trustee.—Under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), and the rules thereunder (see W. N. 1897, p. 267, Misc.), the Chancery Division of the High Court, or a palatine or County Court within their respective jurisdictions (see rr. 30, 31), may, upon application by or on behalf of a person creating or intending to create a trust, or a trustee or beneficiary, appoint a “judicial trustee,” either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (s. 1 (1)). The administration of the property of a deceased person, whether a testator or intestate, is a trust, and the executor or administrator a trustee, within the meaning of the Act (s. 1 (2)). The Act does not extend to any charity, or to Scotland or Ireland (s. 6). The application is made by originating summons, or, if made in a pending cause or matter, as part of the relief claimed or by summons in the cause or matter (r. 2). An executor or administrator may be appointed a judicial trustee for the purpose of the collection and distribution of the deceased’s estate, in the same way as in the case of an ordinary trust; and where an administrator has given an administration bond, he need not generally give security as a judicial trustee under the rules (r. 25). The accounts of every trust of which a judicial trustee has been appointed are to be audited once in every year, and an inquiry into the administration by a judicial trustee of any trust may be directed in any case (s. 1 (6)); and see rr. 14–16, 22). The Court is not precluded by any existing practice from appointing a beneficiary, relation, solicitor, or married woman to be a judicial trustee (r. 5). A judicial trustee may be suspended or removed by the Court (rr. 20, 21). As to the issue of an originating summons under the rules out of district registry, see r. 29.

Real Representative.—Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), where real estate is vested in any person without a right in any other person to take by survivorship, it will on his death (after January 1, 1898), notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him. This provision includes real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him, but it does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant. The personal representatives hold the real estate as trustees for the beneficiaries. The law as respects the dealing with chattels real before probate or administration (see *ante, Acts before Probate*), and matters relating to the administration of personal estate, and the powers and liabilities of personal representatives in respect of personal estate, apply to real estate as if it were a chattel real, except that some or one only of several joint personal representatives cannot, without the authority of the Court, sell or transfer real estate (see *ante, Co-Executors and Co-Administrators*). The real estate will be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate, but the order in which real and personal assets respectively are applicable in payment of funeral and testamentary expenses, debts, or legacies (see *ASSETS*), and the liability of real estate to be charged with the payment of legacies, are not altered or affected. In granting letters of administration, the Court is to have regard to the rights and interests of persons interested in the real estate of the deceased, and his heir-at-law, if one of the next-

of-kin, will be equally entitled to the grant with the next-of-kin. The personal representatives may at any time after the death of the owner of the land, assent (*See ante, Executor's Assent*) to any devise contained in his will, or convey the land to his heir, devisee, or otherwise, subject or not to a charge for any money which the personal representatives are liable to pay, and upon such assent or conveyance all liabilities of the personal representatives in respect of the land cease, except as to any antecedent acts or contracts. After a year from the owner's death, in default of a conveyance by the personal representatives, the Court may order it to be made. The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land will authorise the registrar to register the person named in it as proprietor of the land. The Act also contains provisions for the appropriation of any part of the deceased's residuary estate in or towards satisfaction of a legacy or share of that estate (*see s. 4*). The Act does not affect any duty payable in respect of real estate, or impose on it any new duty (*see ss. 1-5*). In the Act "personal representative" means an executor or administrator (*s. 24 (2)*).

[*Authorities.*—Williams (Sir E. V.), *The Law of Executors and Administrators*, 9th ed., 1893; Walker and Elgood, *Compendium of the Law relating to Executors and Administrators*, 3rd ed., 1897; Williams (J.), *Personal Property*, 14th ed., 1894; Pollock and Maitland, *The History of English Law*, 1895; Seton, *Forms of Judgments and Orders*, 5th ed., 1891, 1893.]

Executory—

Bequests.—See EXECUTORY INTERESTS.

Consideration.—See CONTRACT.

Devises.—See EXECUTORY INTERESTS.

Estates.—See EXECUTORY INTERESTS.

Fines.—See FINES.

Limitations.—See EXECUTORY INTERESTS.

Remainders.—See REMAINDERS.

Settlements.—See SETTLEMENTS.

Trusts.—See TRUSTS.

Uses.—See USES: EXECUTORY INTERESTS.

Executory Interests.

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HISTORY AND ORIGIN.—Executory interests are a class of estates in expectancy. By the rules of the common law every grant of

an estate in expectancy must stand the test of the three well-known canons, viz.: (1) There must be a particular estate of freehold to support the estate in expectancy; (2) the estate in expectancy must vest either during the continuance of the particular estate that supports it, or *eo instanti* that such particular estate determines; (3) the particular estate must not be an estate in fee-simple. Accordingly, remainders were the only estates in expectancy good at common law (see REMAINDER), and originally any estate in expectancy not conforming to these requirements could take effect as an equitable estate only. Estates in expectancy thus granted and taking effect, not as remainders, but at first by the doctrines of the Court of Chancery, and subsequently by the Statute of Uses, are called Executory Interests. They take effect in possession (technically *vest*) upon the happening of a specified event, but do not require any support, as in the case of remainders, and can be limited *in futuro*; the happening of the event may be certain or uncertain, and may be either before or after the determination of the preceding estate; further, the happening may be the destruction (called "in defeasance") of the estate preceding it, and such preceding estate may be an estate in fee-simple.

The Court of Chancery in dealing with these equitable estates in expectancy that it alone recognised had not subjected them to the restrictions already noticed that the common law imposed on legal estates in expectancy; when the Statute of Uses (27 Hen. VIII. c. 10) transformed uses or equitable estates into estates at law, or, as is often said, "clothed" them with the legal estate, the Courts of common law in their exercise of the new jurisdiction which they acquired by force of the statute followed the old doctrines of the Court of Chancery, and allowed future uses (in spite of such uses being by the statute turned into legal estates) to be created without conforming to the canons of validity of expectant estates at law. It is therefore by force of the statute that executory interests created *inter vivos* take effect, but there is also another class of executory interests, viz. executory devises, created, as the name implies, by will. Here again the Court of Chancery preceded the Courts of common law. For before the Statute of Wills (32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5) where a feoffment had been made by a testator to such uses as he should appoint by his will (see FEOFFMENTS), the Court of Chancery allowed the testamentary disposition as valid long before the common law allowed any testamentary disposition of land. The Statute of Uses "clothing" the use with the legal estate transferred it back to the testator and his heirs, thereby taking away the jurisdiction from the Court of Chancery, and giving it to the common law Courts. These latter when by virtue of the Statute of Wills the legal estate came to be devisable gave the same latitude to devises of estates in expectancy that the Court of Chancery had originally given to uses to take effect in future. Every executory interest, therefore, must be created in either of two ways—

(1) Under the Statute of Uses.

(2) By will.

As to executory interests in copyholds, we may add here that executory devises of copyholds have always been held valid, and as to executory interests created *inter vivos*, although the Statute of Uses does not apply to copyholds, the Courts have expressly recognised them as valid (*Boddington v. Abernethy*, 1826, 5 Barn. & Cress. 776; 29 R. R. 393). However, the lord of the manor need not in the absence of any special custom to that effect, accept a surrender *inter vivos* to such uses as A., the surrenderee, shall appoint, and in default of appointment to the use of A., his

heirs and assigns for ever according to the custom of the manor (*Flack v. Master, etc., of Downing College*, 1853, 13 C. B. 945; 17 Jur. 697). See COPYHOLD.

SHIFTING AND SPRINGING USES.—Executory interests created *inter vivos* are usually classified into *shifting uses* and *springing uses*, and executory devises admit of precisely the same classification as shifting or springing.

A *shifting use* or devise is a conditional limitation, and when it becomes an estate in possession is substituted for and destroys (called “defeats”) a prior estate created by the same grant or devise. We may take as common instances the ordinary limitation in a marriage settlement to trustees in fee to the use of A. (the settlor) in fee until the intended marriage, and after the solemnisation of the marriage to the use of, *e.g.*, B. (the husband) for life and other the uses declared by the settlement—here the uses declared by the settlement take effect upon the happening of the event (the marriage) in defeasance of the fee-simple estate of the settlor. Other instances are the names and arms clauses in strict settlements, providing that if the party for the time being entitled to the land refuses to take a certain name and bear certain arms, the land shall go over from him to those entitled in remainder. And as an example of a *shifting devise* we may take the common form of devise to A. in fee, but if he shall die under twenty-one to B. in fee.

In the case of a *springing use* or devise the estate is limited *in futuro* (a limitation that would at common law be void of a freehold), and when it takes effect in possession does not do so in substitution for or defeasance of a particular estate—it springs up into existence upon the happening of a specified event, *e.g.* grant to A. in fee to the use of B. in fee on his attaining twenty-one, or devise to A. in fee if he shall attain the age of twenty-one, or devise to children of a third party, no child of such party being alive at the death of the testator (*Lechmere v. Lloyd*, 1881, 18 Ch. D. 524, *infra*). In these cases until the use takes effect in accordance with the limitation by the happening of the condition, the legal estate remains in (technically called *results to*) the grantor, for the grantee takes no interest by the grant; in executory devises, in the testator’s heir or residuary devisee.

The doctrine of *scintilla juris* in connection with executory interests, though now abolished by Lord St. Leonards’ Act (23 & 24 Vict. c. 38), requires some notice. The Act by sec. 7 provides that where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such *seisin* to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

The controversy that the passing of the Act set at rest was briefly this: The estates of the trustee and his *cestui-que trust* must be coextensive according to the well-settled principle of English law; in other words, the legal seisin and the use must end at the same time. Applying this principle to a grant to A. in fee to the use of B. in fee until some event shall happen, and after such event to the use of C. in fee; the event happens, and the use shifts. B.’s use is coextensive with A.’s legal estate, if B.’s estate is determined A.’s is determined, how then can A. or anyone else be seised to the use of C.? The solution of this legal quibble

was that the original seisin which had been executed in B. reverted to A., and that pending this the possibility of it so reverting was vested in A., and this possibility was called the *scintilla juris*. The better opinion was that no such *scintilla* remained, and that all the uses took effect as and when they arose by force of and relation to the estate and seisin originally vested in A.; and this opinion, of which the foremost advocate was Lord St. Leonards, was incorporated in the provision of the Act above referred to.

There is yet another class of important executory interests that take effect as springing uses by virtue of the Statute of Uses, which as soon as "the uses created by them spring up draw to them the estate of the feoffee; and the statute executes the possession" (*Co. Lit.* 271 *b*, *h* (1) vii.). These are *powers*, and we may cite as an instance the common form of grant or devise to A. in fee to such uses as B. and C. or the survivor shall appoint, and subject to and in default, of any such appointment to the use of X. or other the uses declared. But the law of powers is an important branch of the law that requires separate treatment, and having mentioned them for the purpose merely of a complete classification of executory interests, we will not here pursue the subject further. See POWERS.

Before proceeding further, in view of the difference of terminology in dealing with the subject of executory interests, we may pause to explain that, strictly, the term executory interests should include all such interests whether created by will or deed, and the term executory limitations all dispositions whether by deed or will by virtue of which the executory interest is created; such dispositions by will are also called executory devises and executory bequests, and in practice the terms executory devise and executory bequest are often loosely used to denote the subject-matter of the disposition as well as the disposition itself, *i.e.* the executory interest created by the executory devise or bequest (see hereon Challis, *R. P.*, 2nd ed., pp. 65, 66).

CONSTRUCTION: REMAINDERS OR EXECUTORY INTERESTS?—Having already pointed out the main differences between executory interests and remainders, we must now state and explain a well-settled principle of English law, *viz.*: "Every gift which can *possibly* take effect as a remainder is absolutely excluded from being construed as an executory limitation." The word *possibly* is of great importance, for it is the possibility at the time of the creation of the interest of its taking effect and not the actual facts that must be taken into consideration in applying the principle; it follows, therefore, that it is immaterial that by construing a gift as a remainder it will fail to take effect owing to the happening or non-happening of an event (*Festing v. Allen*, 1843, 12 Mee. & W. 279). But where the gift is to a class which can by no possibility be ascertained at the determination of the preceding estate of freehold, the class can only take (or, in other words, the gift can only possibly take effect) on the footing of an executory devise. Accordingly, in a devise to A. for life, and from and after her death to such of her children in fee as *either before or after her decease* should attain twenty-one if males, or if females attain twenty-one or marry, and if there be no such child over, the limitation is an executory devise, because it could not possibly take effect as a remainder in respect of children who do not comply with the condition before the death of the tenant for life; for the class cannot possibly be ascertained during the lifetime of the tenant for life (*i.e.* at the determination of the preceding estate of freehold), as would be necessary in the case of a remainder (see *Lechmere v. Lloyd*, 1881, 18

Ch. D. 524). So a gift to A. for life, and after her death to all the children of B. living at A.'s death or thereafter to be born, is an executory devise, for the class of children "thereafter to be born" could not possibly take by way of contingent remainder, and any other construction would absolutely defeat the testator's intention as expressed by the words of the gift "thereafter to be born" (*Miles v. Jarvis*, 1883, 24 Ch. D. 633). The great importance of treating these and similar limitations as *executory* is that parties are thereby allowed to come in, who, if the devise were treated as a contingent remainder, would be altogether excluded from the benefits of the gift by the rules that if not complied with destroy a contingent remainder. Similarly where a devise of freeholds contained the usual proviso that if the life tenant should attempt to alienate his interest or become a bankrupt or the estate devised should be taken in execution by any process of law, the gift to him should become void and cease as if he were dead, and the estate devised should thenceforth vest in and belong to the persons therein named, and a judgment creditor obtained the appointment as a receiver of the rents of the tenant for life, it was held that the appointment being a taking in execution within the meaning of the clause, the gift over on the determination of the tenant for life's interest was an executory devise and not a remainder, for the gift over was to take effect not on the determination but in defeasance of the life estate. And the gift over being to children who should attain twenty-one, it was held that all children, whether born before or after the receivership order, were entitled who should attain the age of twenty-one (*Blackman v. Pyshe*, [1892] 3 Ch. 209). We may take as another and last instance of a limitation construed as an executory devise and not as a contingent remainder a gift to A. for life and from and after his death to the use of such child or children of A. living at his death and such issue then living of the child or children of A., then deceased, as either before or after the death of A. shall attain twenty-one or die under twenty-one and leave issue. The reasoning upon which this construction and the decision in *Lechmere v. Lloyd* are based is thus stated by Chitty, J., in *Dean v. Dean*, [1891] 3 Ch. 150 at p. 155: "By the express words that those who attain twenty-one after the determination of the preceding estate are to take, the testator shows that in the event which he contemplates of all the children not attaining twenty-one in the lifetime of the tenant for life, there is to be a gap between the determination of the preceding estate and the future estate to the children. The testator has used such a form of gift as, on the face of it, is inapplicable to a remainder, and consequently the Court is precluded from applying the rule that every gift which can take effect as a remainder must not be construed as an executory devise. The Court cannot construe the gift as a remainder unless it strikes out part of the express limitation; and the rule referred to neither requires nor justifies such an alteration of the testator's language.

"According to the judgment of the Court in *Festing v. Allen*, a contingent remainder to the children of the tenant for life who shall attain twenty-one, vests absolutely in those children who, at the death of the tenant for life, have attained that age, to the exclusion of those who subsequently attain that age. But, according to the reasoning now under consideration, where the limitation is to children who either before or after the death of the tenant for life attain the age of twenty-one, the testator expressly attaches the qualification of membership of the class to those children who attain the age after the tenant for life's death, and in order to give effect to the express and lawful limitation in favour of such children, the Court is bound to hold that the limitation taken in its entirety is an executory devise.

This reasoning . . . has the merit of giving effect to a lawful intention expressed in clear terms."

On the other hand, unless there are words clearly showing that the limitation is intended to operate as an executory devise, if land is given to a life tenant, and after his death to such of his children as shall attain twenty-one, the limitation is a contingent remainder, and only children attaining the age during the lifetime of the tenant for life take under the gift excluding any of the children who have not then attained that age, and it vests in such of the children, if any, as attain twenty-one in the prescribed limit of time (*Festing v. Allen, supra*; *Symes v. Symes*, [1896] 1 Ch. 272).

ASSIMILATION OF CONTINGENT REMAINDERS TO EXECUTORY INTERESTS.—The destruction of contingent remainders by the natural determination of the particular estate before the remainder was ready to take effect in possession (*i.e.* vest) by reason of the contingency not having happened, was felt to be a serious hardship; *e.g.* gift to A. for life remainder to the first of his sons who shall attain the age of twenty-five. Accordingly, it was provided by the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 34), that every contingent remainder, created by any instrument executed after the passing of the Act or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

EXECUTORY BEQUESTS.—We have dealt hitherto with executory interests in realty only. There can be no estate in personalty which is essentially in the eyes of the law the subject of absolute ownership only, and accordingly there cannot be a succession of legal interests carried out in such property; the taker of the first life interest is entitled to the corpus absolutely and indefeasibly. But although for this reason there can be no executory interests *inter vivos* of personalty, the Courts have by analogy to executory devises allowed certain executory bequests. The most important instance of such an executory bequest is in the case of a term of years; and it is an old-established doctrine that by a bequest of a term of years to A. for life, and after his death to B., the legal interest passes after the death of A. by analogy to an executory devise (*Manning's case*, 8 Co. Rep. 95; *Lampett's case*, 10 Co. Rep. 47). And a bequest of leaseholds to A., "his executors, administrators, and assignees for ever," but if he die before twenty-one without issue then over, is good (*Martin v. Long*, 1690, 2 Vern. 151). But it is by no means in all personalty that such successive interests can be given. Chattels *quæ usu consumuntur* cannot as a general rule be given over after the death of the first taker (*Randall v. Russell*, 1817, 3 Mer. 190; 17 R. R. 56; *Andrew v. Andrew*, 1845, 1 Coll. 686, at p. 690). However, in the case of consumable articles the Courts have allowed executory bequests if such articles were used in connection with the trade or business of the testator, *e.g.* a gift of a business and stock-in-trade followed by a gift over has been held to confer a life interest only on the first taker (*Cockayne v. Harrison*, 1872, L. R. 13 Eq. 432). And in *Phillips v. Beal*, 1862, 32 Beav. 25, under a bequest by a wine merchant of all his household goods, furniture, . . . and everything that he might die possessed of to his wife for her life, and after her decease to his daughter, it was held that the wife

took absolutely the wine which the testator had for his private use, but a life interest only in the rest. And by a gift over of such chattels as the first legatee "shall not require for consumption" (*In re Colyer*, 1886, 55 L. T. 344), the first legatee takes a life interest only: that is to say, he may consume what he can but not sell or dispose of the articles. On the other hand, a gift of farming implements and stock to A. for life, followed by a clause that she shall in no way be accountable for depreciation or diminution, and after her death the residue to A.'s children, gives A. an absolute interest in the implements and stock in spite of the general rule above mentioned (*Breton v. Mockett*, 1878, 9 Ch. D. 95); and likewise where a business was bequeathed to three sons in equal shares, followed by a proviso that on the death of either of them (whether before or after the testator) the shares of him or them, so dying, of and in the messuage, plant, and stock-in-trade should go to his next-of-kin, it was held that on a sale by one of the sons of his share in the business it was not necessary to set apart any share of the purchase money for the persons who might be ultimately entitled as the vendor's next-of-kin (*Conolly v. Conolly*, 1887, 56 L. T. 304).

The instances of executory bequest above noticed are the only type that law recognises, i.e. the gift over takes effect, not by making the preceding gift as an absolute gift of the property liable to be defeated, but by cutting it down to a life interest. After an interest which is clearly expressed to be absolute, there can be no limited other interest in personalty whether by deed or will, e.g. a husband bequeathed to his wife £10,000, "afterwards the sum to go to the residuary legatees therein mentioned": it was held that giving the words of the will nothing but a reasonable construction, the testator had given in clear language and in words of legal significance an absolute legacy to his wife, and that by the subsequent words he could not affect the absolute gift, the legacy being the widow's to do what she liked with, the Court being powerless to give effect to any subsequent *intention* with respect to the legacy after her death (*In re Percy*, *Percy v. Percy*, 1883, 24 Ch. D. 616).

ALIENATION AND DEVOLUTION OF EXECUTORY INTERESTS.—At the common law executory interests, not being estates, but possibilities only (see ESTATES) of having an estate, were not alienable *inter vivos*. They might, however, pass by way of estoppel so as to bind the interest when it accrued upon the happening of the contingency, this being the only way an executory interest until the happening of the contingency could at law be transferred. Equity, however, would enforce such an assignment or a contract to assign if made for valuable consideration (Fearn, *C. R.* pp. 366, 551; and see *Wright v. Wright*, 1747, 1 Ves. 409; *Bekley v. Newland*, 1723, 2 P. Wms. 182; *Hobson v. Trevor*, 1723, 2 P. Wms. 191). But now executory interests have been made assignable by statute, and the Law of Real Property Act, 1845 (8 & 9 Vict. c. 106), enacts (s. 6) that after the 1st of October 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest in any tenements or hereditaments of any tenure, *whether the object of the gift or limitation be or be not ascertained*, and whether immediate or future, and whether vested or contingent in any tenements or hereditaments in England of any tenure, may be disposed of by deed.

Executory interests were even before the Wills Act transmissible by descent or devise or bequest (*Jones v. Roe*, 1789, 3 T. R. 88; 17 Ves. 182; 1 R. R. 656; *Seauen v. Blunt*, 1802, 7 Ves. 300), but at common law such an interest could not pass by devise if the person to take was not in any degree ascertainable before the happening of the contingency (see *Doe v. Tomkinson*,

1813, 2 M. & S. 164). Now sec. 3 of the Wills Act expressly mentions among the property that may be disposed of by will all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will.

FAILURE OF EXECUTORY INTERESTS.—An executory interest cannot be extinguished by *merger*, for not being recognised by the law as estates until they actually vest, they are not by their nature capable of coalescing with any estate. "It is not the union of two concurrent coexisting fees, but a case of one limited and determinable fee, and of another fee not concurrent, but created *de novo* to commence *in futuro* upon the ending of the limited fee; and until such fee ceases it has no existence nor anything beyond the chance of future existence" (*Goodtitle v. White*, 1812, 15 East, 174; 13 R. R. 429).

There are but three ways in which an executory interest may be determined; two of these are by force of the statute law—

(1) If limited to take effect after the determination or in defeasance of an estate tail, it will be barred together with the estate tail by barring the entail. For sec. 15 of the Fines and Recoveries Act (3 & 4 Will. IV. c. 74) provides that every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, may dispose of the entailed lands as against (among others) all persons whose estates are to take effect "in defeasance" of the estate tail vested in the person making the disposition, "saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made." With respect to the effect of this saving clause the case of *Milbank v. Fane*, [1893] 3 Ch. 79, should be noticed:

Lands were devised in trust for A. for life, remainder to his first and other sons successively in tail male, with similar remainders over to B. and C., younger brothers of A., and their respective first and other sons successively in tail male, and the will contained a proviso that upon the happening of a specified event the trusts in favour of B. and his issue male "should thenceforth be postponed to and take effect in remainder next immediately after" the trusts in favour of C. and his issue male. A., being tenant for life in possession under the will, B. and his eldest son, with A.'s consent, executed a disentailing deed conveying the lands in fee-simple. Subsequently, during the continuance of A.'s life estate, the event specified in the proviso happened, and upon A.'s death C.'s eldest son became, unless barred by the disentailing deed, entitled to the lands under the proviso, as tenant in tail in possession:

It was held that the true effect of the proviso was to make, on the happening of the specified event, the estate limited to C. and his issue male an estate "in defeasance of" and not "prior to" the estate tail of B. and his issue male, and therefore that the estate of C.'s eldest son was barred, under the statute, by the disentailing deed.

(2) The Conveyancing Act, 1882 (45 & 46 Vict. c. 39, s. 10), enacts as to executory limitations to take effect on failure of issue, and contained in any instrument coming into operation after the commencement of the Act, that where a person is entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation

shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. This provision will be referred to later on in dealing with conditional limitations on failure of issue.

Conditional Limitations.—(3) Lastly, an executory interest being a conditional limitation may fail to take effect if the event upon the happening of which it is so to take effect—

(a) Is or becomes impossible of performance;

(b) Is by its nature looked upon by the law as illegal or repugnant, either with reference to the executory interest or to the preceding estate;

(c) Does not as to the time within which it *must* happen, if at all, conform to the requirements of the law. In this latter case the executory limitation is void *ab initio*.

The consideration of the first two subdivisions above given, viz. (a) and (b), belongs to the subject of CONDITIONS, but we may state here certain well-recognised principles as to the rules which regulate the validity of executory devises with regard to the illegality or repugnancy of the gift over. Every gift over will fail of effect if it is a defeasance either by condition or conditional limitation or executory devise, if it would take effect in derogation not merely of the right of alienation but of any of the natural incidents of the preceding gift; and the Courts will not allow any incident of the estate given by the first gift to be taken away indirectly by an executory gift over. "An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person" (per Kay, J., in *In re Dugdale, Dugdale v. Dugdale*, 1888, 38 Ch. D. p. 182).

The result is, the executory interest fails altogether. For the same reasons a devise to a person in fee-simple subject to a proviso for determining his estate and interest on bankruptcy, and that such estate shall then go over to others, confers an absolute estate in fee-simple on the devisee, and the conditional limitation in the proviso is void for repugnancy and fails of any effect as an executory devise (see *In re Machu*, 1882, 21 Ch. D. 838). The proviso will not be read together with the original gift; and the law has always made a clear distinction between a condition pure and simple, and, on the other hand, a conditional limitation (or, in other words, an executory interest), a distinction often less technically expressed by the words that an estate in fee may be limited *until* bankruptcy, etc., in which event there shall be a gift over, but that it cannot be limited in fee and followed by a gift over *if* the grantee alienates. And a gift over, if the grantee of the preceding estate does *not* alienate, is just as much an infringement of the natural incidents of an estate in fee or of absolute ownership. These and other rules regulating the validity of executory devises in this respect are discussed by Fry, J., in *Shaw v. Ford*, 1877, 7 Ch. D. 669. Several houses were devised to the four sons of a testator share and share alike, to hold subject to certain conditions, with an executory devise over if the conditions were not complied with. The conditions were: (1) The property was not to be divided or alienated without the consent of all four or their representatives; (2) till such division, the rents to come into one common fund; (3) failing such lawful distribution, there were executory devises over. It was held that the executory devises over were void, and that the four sons took as tenants in common in fee, and no

clearer summary of the law could be given than the principles of this decision as there stated:—

“*Prima facie* and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that an executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Guliver v. Vaux* [8 De G., M. & G. 167 n], *Holmes v. Godson* [*ibid.* 152], and *Ware v. Cunn* [10 Barn. & Cress. 433]. Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void, and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void, because the right of alienation is incident to every estate in fee-simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to that effect upon not alienating, because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley v. Piccolo* [3 Ves. 324], *Ross v. Ross* [1 Jac. & W. 154], and *In re Falden* [1 De G., M. & G. 53]. It is true that in some of the earlier cases, such as *Doe v. Glover* [1 C. B. 448] and *Watkins v. Williams* [3 Mac. & G. 622], a distinction was taken between realty and personality, but that was overruled in *Holmes v. Godson*, and it never had anything in the nature of principle or reason to support it.”

On the other hand, an executory devise to take effect upon the failure of a prior gift will take effect though such prior gift do not fail in the precise way anticipated by the testator. This principle is laid down by the case of *Jones v. Westcomb*, Prec. Ch. 316; 1 Eq. Cases Abridged, 245; and Tudor, *L. C. Real Property*, p. 869. A., taking for granted that his wife was *enccinte*, bequeathed a term of years to her for life and after her death to the child she was then *enccinte* with; but if such child should die under twenty-one there was to be a gift over. The wife was not *enccinte*, but it was held that though the contingency never happened the gift over was good. The principle established by *Jones v. Westcomb* is “that an ulterior, executory or substituted to arise upon the failure of a prior, interest may take effect although the mode in which that event has happened has not been precisely provided for by the testator, the foundation of the principle being that by necessary implication it must be considered that it was the testator’s intention that the ulterior gift should take effect at *all* events upon the failure of the prior one, he not making the failure in a *particular mode* a condition precedent” (Tudor, *L. C. Real Property*, 871). The application of the principle is not restricted to wills, but has been extended to marriage settlements (*Osborn v. Bellman*, 1860, 2 Gif. 593) and voluntary deeds (*Barnes v. Jennings*, 1866, L. R. 2 Eq. 448). So that where the wife’s property was settled on trustees upon trust after the death of the husband

and wife, for the children of the marriage in the usual way, and this was followed by a gift over to third parties if all the children should die, and there was as a fact no issue of the marriage ever born, the gift over nevertheless took effect. And to take a stronger instance, where a settlor settled property on A., B., C., and D. in equal shares, and provided that if any of the four *should die* in his lifetime leaving specified issue, the share should be in trust for such issue; and if any of the four *should die* in his lifetime without leaving issue, the share should go over or accrue to the others, and A. and B. were as a fact already dead at the date of the settlement, one leaving and the other not leaving issue, the gift over of their shares was not allowed to fail. The case was decided on the principle as stated in *In re Sheppard's Trusts*, 1854, 1 Kay & J. 269: "Wherever there is a conditional limitation defeating an absolute estate given prior to the limitation, if the precedent limitation *by any means whatever is out of the way*, the subsequent limitation takes effect." And see, also, *Ardyn v. Ward*, 1749, 1 Ves. at p. 420. Two recent cases where the principle above laid down have been held not applicable and applicable respectively require notice. In the one instance a testator directed his trustees to pay the income of trust funds to his wife during her life or until remarriage, and from and after remarriage he directed them to pay her an annuity, and from and after her death he directed his trustees to levy and pay certain legacies thereafter bequeathed, all of which though payment was postponed till after his wife's death he directed to be taken as vested immediately on his decease. The wife married again, and it was held that, no doubt appearing on the will as to the testator's intention, the legacies payable at his widow's death were not to be paid on her remarriage, but must be postponed till her death, and that the principle of *Jones v. Westcomb* was inapplicable (*In re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640). On the other hand, in *In re Ackroyd, Roberts v. Ackroyd*, [1893] 3 Ch. 363, by a marriage settlement funds had been settled upon trust to pay the income to the wife for life, and after her death to the husband until *he should become bankrupt or alienate the same or until his death*, whichever should first happen; and after the decease of the survivor of the husband and wife upon trust for the children of the marriage. The husband became a liquidating debtor, and then the wife died leaving him surviving. It was held (distinguishing *In re Tredwell, supra*) that the limitation over had taken effect, and that the income of the trust fund between the death of the wife and the death of the husband belonged to the children.

(c) *On the failure of executory interests owing to their non-compliance with the law as to the time within which they must take effect.*

The law has always looked with disfavour upon any attempt to "tie up" property, whether corpus or income, beyond certain limits that it prescribes, considering such tying up as contrary to public policy. The restrictions imposed on the accumulation of income by the provisions of the Thelluson Act (39 & 40 Geo. III. c. 98) and the Accumulations Act, 1892 (55 & 56 Vict. c. 58), are treated of under ACCUMULATIONS. We need here therefore consider only the restrictions on the disposition of corpus, and the limits of time beyond which the absolute vesting of an executory interest (and indeed of any property) indefeasibly in possession may not be postponed. The rule of law restricting such dispositions is called the Rule against Perpetuities, and any disposition infringing it is said to be "void for remoteness." The limits imposed by the rule were definitely laid down by the House of Lords in *Cadell v. Palmer*, 1833, 2 Cl. & Fin. 372; Tudor, *L. C. Real Property*, 424. It was there held that a limitation by way of executory

devise which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years as a term in gross, and without reference to the infancy of any person, is a valid limitation, and that accordingly a limitation by way of executory devise which was not to vest until after the expiration of a term in gross of twenty years from the survivor of twenty-eight persons who were living at the death of the testator, and of whom seven only were to take interests under the devise, was valid. It is beyond the scope of this article to treat of the history of the rule or of its application other than to executory limitations (see PERPETUITIES; POWERS). As fixed by the rule, the limit of time within which necessarily, if at all, every executory limitation to be good must be capable of vesting, is a life or any lives in being, and twenty-one years after the dropping of such life or last of such lives. And for the purposes of this rule a child *en ventre sa mère* is considered as in existence, not only so as to be a life in being within the rule, but also so as to allow the executory interest to vest in him. It was expressly stated in *Cadell v. Palmer* that if to the term of twenty-one years there be added the number of months equal to the longest or ordinary period of gestation, the limitation would be bad. It is for this reason that the expression "allowing for a period of gestation" is loose and calculated to mislead, for a period of gestation is allowed only in case of *actual* gestation, *i.e.* a child *en ventre* is treated as in existence as a life in being.

By the words "*necessarily, if at all,*" is meant that only possible and not actual events are the test of the validity of the limitation; so that (1) the event on the happening of which the limitation is to take effect may or may not happen; but (2), admitting the possibility of the event happening, its nature must be such that it could not possibly happen at any period outside the limit of time fixed by the rule. This limit of time begins to run from the time the limitation is created, *i.e.* if by deed, from the time of the execution of such deed; if by will, from the time of the testator's death.

The rule against perpetuities does not apply, however, to executory limitations to take effect subsequently to the determination of an estate tail. These, as has been already noticed above, can be defeated by barring the entail, and therefore have not the mischievous effect of indefinitely suspending the vesting of property, the prevention of which is the object of the rule (see *Heasman v. Pearce*, 1872, L. R. 7 Ch. 273).

EXECUTORY LIMITATIONS ON FAILURE OF ISSUE. — There remains another class of executory limitation, *viz.* executory limitations on failure of issue, which requires special notice in connection with the rule. It is obvious that if in a gift to A., and if he shall die without issue, then over, ("die without issue" is to be construed as "die and his issue shall fail at any time," whether before or after his death), the gift over would be void for remoteness, for such issue must not fail, if it fail at all, within the time limit fixed by the rule. The Courts before the Wills Act (1 Vict. c. 26) interpreted death without issue to mean death and failure of issue, and considered that the testator had meant to give an estate tail, and gave an estate tail to A. Naturally this estate tail could then be barred and the testator's true intention completely frustrated. To obviate this injustice, the Wills Act provided that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his

issue unless a contrary intention appear by the will. (As to the construction of such limitations in a deed, see *Olivant v. Wright*, 1878, 9 Ch. D. 646.) We have already noticed above the further inroads of the Conveyancing Act, 1882, as to limitations on failure of issue. It should be noticed that this class of limitation are by statute restricted as to their duration only (*i.e.* till any issue attains twenty-one), not vitiated.

The effect of a limitation being void for remoteness on subsequent limitations depending or expectant thereon is not to accelerate but to avoid such dependent or expectant limitations; and it makes no difference that the preceding limitation could not as a fact take effect. The leading case on this point is *Proctor v. Bishop of Bath and Wells*, 2 Black. H. 358; 3 R. R. 417. In this case there was a devise to the son (not *in esse*) of A. if he should be bred a clergyman and be in holy orders; but if A. should have no such son then gift over; and A. having died without any son, the limitation was held void for remoteness, and the gift over depending on it was therefore void too. And where there are gifts over which are void for remoteness, and a subsequent and independent clause on a gift over not so void for remoteness, effect cannot be given to such a clause "unless it will detail in and accord with previous limitations which are valid" (per Lord St. Leonards in *Money Penny v. Dering*, 1852, 2 De G., M. & G. 145, 182).

ALTERNATIVE AS DISTINGUISHED FROM SUBSEQUENT LIMITATIONS.—It is important therefore to clearly distinguish a *subsequent* from an *alternative* limitation. If there is an alternative gift on two contingencies separable so as to make the gift take effect on the happening of either of two events, one of which events is within and the other without the limits of time of the rule of perpetuities, the gift over will be good or void according to which of the two events happens. We may illustrate this principle by two cases. The will of a testatrix contained an ultimate limitation to her right heirs in case both her daughters should die without leaving any child or the issue of any child living at the decease of the survivor of them or of the survivor of their respective then present or any future husbands. Neither of the daughters married again. Each died leaving her husband surviving, but no issue. To determine whether the ultimate gift over was good or bad it was necessary to decide whether the testatrix had made alternative gifts over on the happening of two events, or a gift over on an event involving two things, for only in the former case could the gift over be good. It was held that it was a gift over on failure of a class ascertainable on the death of the survivor of the daughters and their husbands *present or future*, and therefore void for remoteness. "It is not enough," said Cotton, L.J., "that you can separate the gift over so as to make it an alternative gift on two contingencies—the testatrix must herself have separated it so as to make it take effect on the happening of either of two events" (*In re Hurry, Peck v. Scaroy*, 1888, 39 Ch. D. 289). So in the case of a devise to X. for life and after her decease to such of her children as should attain twenty-one, and also such children of any son or daughter who might die under twenty-one as should live to attain twenty-one, followed by a gift over in case X. should depart this life without leaving any lawful issue who shall live to attain a vested interest. X. died without ever having had a child, and it was held that the gift over was void for remoteness (*In re Bennet, Smith v. Bennet*, [1891] 3 Ch. 242).

As to executory limitations under powers, they are discussed under POWERS; and it will suffice to say here that executory limitations arising under general powers of appointment are not liable to failure by reason of the rule against perpetuities, for powers of disposition under general powers

of appointment being equivalent to powers of disposition by an owner do not tend to tying up property. But as against executory limitations arising under special powers of appointment, the time fixed by the rule of perpetuities begins to run as from the operation of the instrument creating the power. We may add also that although, as above mentioned, limitations depending or expectant upon a prior limitation void for remoteness are themselves invalid, limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities (*In re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54). As to powers of sale and exchange contained in settlements and wills, it was at one time doubted whether they were valid, if not expressly restricted to the limits allowed by the rule against perpetuities. It has, however, been decided that they need not be so restricted, and a power to trustees to sell "at any time and at their discretion" has been held to be valid (*Nelson v. Callow*, 1848, 15 Sim. 353).

LIMITATIONS TO A CLASS OF OBJECTS.—In gifts to a class, unless the share of *each* object is ascertainable within the period prescribed by the rule, the whole gift is void (see *Hale v. Hale*, 1876, 3 Ch. D. 643, and the principles there laid down by Jessel, M. R.). The limitation being to a class, the parts of it cannot be severed so as to treat one portion as good and the other void, *e.g.* in a gift of £3000 to A. for life and after in trust for all the children of the said A. who shall attain twenty-one and the lawful issue of such as shall die under that age leaving lawful issue at his, her, or their decease, *which issue shall afterwards attain the age of twenty-one*; the italicised words being treated as words of description and not words of superadded condition, it was held that the whole gift after the life interest was void for remoteness (*Pearks v. Moseley*, 1880, 5 App. Cas. 714).

But these rules as to limitations of this sort must be taken subject to certain qualifications introduced by some of the rules by which the Courts have been guided in construing limitations, for the purpose of seeing whether they are void for remoteness or not, viz. :—

1. You must ascertain the objects of the gift by construing without any reference to the rules of law prohibiting remote limitations, and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction, you are then to apply the rules of law as to perpetuities to the objects of the gift so ascertained.

2. If the devise be to a single person answering a description at a time beyond the limits allowed or to a series of given individuals answering a given description, and any *one* member of the series intended to take may by possibility be excluded by the rule as to remoteness, then no person whatever can take, *because the testator has expressed his intention to include all, not to give to one excluding others.*

3. Where the gift is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period beyond the limit allowed, then again, for the reasons in the preceding rule, none can take.

But these two rules, as will be seen, are based upon the intention of the testator, and accordingly admit of the exception in rule 4.

4. Where there is a gift to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number

of the other members, then the gift may be good as to those within the limits allowed by law (cp. *Storrs v. Benbow*, 1833, 2 Myl. & K. 46).

Accordingly in a devise to A. for life and after his death to all and every the child or children of A. for their lives in equal shares, followed by a devise over after the decease of any or either of such child or children of the part or share of him, her, or them so dying to his, her, or their child to be begotten, is good as to the children of such children of A. as were living at the death of the testator, "for the gift to them must take effect, if at all, within the limits allowed by the law" and the gift to every member of the class of children is single and independent of the gift to every other member of the class, and cannot be affected by the result of the gift as to such other members" (*Catlin v. Brown*, 1853, 11 Hare, 392; and see the rules there stated). The principle was applied in the recent case of *In re Russell, Dorell v. Dorell*, [1895] 2 Ch. 698, by the Court of Appeal, where a testator gave his residuary estate in trust after the death of M. and her husband for all the daughters of M. who should attain twenty-one or marry under that age, with a proviso that the share of any daughter should be held upon trust for her for life and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, who attained twenty-one, and was born in the testator's lifetime. It was held that the proviso for resettlement of the shares must be construed as applicable to each share separately; that it in no way mixed them up, but operated separately upon each; and that although it would have been void for remoteness in the case of daughters of M. born after the death of the testator, it was valid in the case of the daughter of M. born in the testator's lifetime.

"If," said Rigby, L.J., delivering the judgment of the Court, "there had been a proviso which could only operate upon all possible shares, if it operated at all, the case would have been different; but the settlement of the plaintiff's (M.'s daughter's) share is to take place whether there are other shares or not, and it takes place as from the testator's death in favour of the children of a person then living, and is quite unobjectionable. This is not a gift over which depends upon events so stated as to involve a possibility of its taking effect outside the permitted limits, or in favour of persons who might take interests vesting beyond those limits. No splitting of the clause is necessary, since it is so framed as to apply separately to the plaintiff's share The cases of *Griffiths v. Ponnall*, 1844, 13 Sim. 393; *Catlin v. Brown*; *Wilson v. Wilson*, 1859, 28 L. J. Ch. 95; *Knapping v. Tomlinson*, 1864, 10 Jur. N. S. 626, are all authorities in support of the conclusion arrived at" (*In re Russell*, [1895] 2 Ch. at p. 702).

Though, as a general rule, in limitations to a class of objects the whole is void unless the share of each member is vested within the perpetuity limits, yet (adopting the language of Rigby, L.J.) the limitation can be so framed as to make it apply separately to each member; and the cases last cited are instances of the conveyancers' efforts in this behalf.

It was for some time contended that the rule of perpetuities had abrogated or superseded the old rule of law that forbade the limitation of "a possibility upon a possibility." It has now been settled by two recent cases that the rule of perpetuities was but an additional restriction of more modern origin, introduced by the law to contend against the evils of a perpetuity arising from the recognition of executory limitations. In the case of *Whitby v. Mitchell*, 42 Ch. D. 494, affirmed on appeal, 1890, 44 Ch. D. 85, it was laid down that "the old rule against a possibility on a possibility," viz. that although an estate may be limited to an unborn person

for life, yet a remainder cannot be limited to the children of that unborn person as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities, the two rules being in fact independent and coexisting. This opinion had long before been advocated by the late Mr. Joshua Williams, Mr. Butler, and other conveyancers. And in *Money-penny v. Dering*, 1852, 2 De G., M. & G. 145, quoted in the judgment to *Whitby v. Mitchell*, Lord St. Leonards said: "Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon." Accordingly where by a post-nuptial settlement, made in pursuance of ante-nuptial articles, freehold lands were limited to the use of the husband and wife successively for life, and after their death to the use of their issue (born before any appointment made) as they should by deed appoint, and the husband and wife had issue two daughters, and appointed one moiety to the use of one daughter for life, with remainder to the use of such person or persons as she should by will appoint, and, in default of appointment, over, it was held that the only part of the appointment which was good was the limitation to the daughter for life; the appointment being read into the settlement, and the latter treated as made prior to the marriage of the husband and wife. See for another illustration of this principle *In re Frost*, 1890, 43 Ch. D. 246, extended to the case of a double possibility by reason of there being interposed a possible estate for life to a person not in existence and a contingent remainder over on the death of that person.

The extension of this rule so as to forbid "every limitation in which an ingenious person can detect what he calls a double possibility" will be found discussed and criticised in Challis, *R. P.*, 2nd ed., pp. 104-107; Jarman on *Wills*, pp. 249 *et seq.*

EXECUTORY LIMITATIONS TO CHARITIES.—Executory limitations to charities were not subject to the rule against perpetuities (*Christ's Hospital v. Grainger*, 1849, 1 Man. & G. 460). In that case a testator bequeathed certain property to the Corporation of Reading for certain charitable purposes, with a direction that if the Corporation of Reading should for a year neglect, omit, or fail to perform the directions of the will, the gift should be void, and the property transferred to the Corporation of London, for the benefit of Christ's Hospital. The directions of the will were for over twenty years disregarded; it was held that the gift over took effect, and the principle laid down "that a contingent limitation over of property from one charity to another is not within the principle of the rule against perpetuities, and therefore the limitation in question was no infringement of the rule."

The principle was recently affirmed in *In re Tyler*, [1891] 3 Ch. 252, by the Court of Appeal in the case of a gift over from one charity to another in the event of the former failing to keep in repair a family tomb. But the principle established by the two cases above cited has no application to cases where (1) an immediate gift in favour of private individuals is followed by an executory gift in favour of a charity; (2) an immediate gift in favour of a charity is followed by an executory gift in favour of private individuals (per Stirling, J., in *In re Bowen, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; and see *Chamberlayne v. Brockett*, 1873, L. R. 8 Ch. 211). So that in a bequest to trustees upon trust to establish schools, followed by a proviso that if at any time the Government should establish a general system of education the trusts of the legacies should cease, and there should be a gift over to the residuary legatees, the gift over was held to be void as not

necessarily vesting within the perpetuity limits. On the same principle a bequest of an annuity to be provided to a volunteer corps on the appointment of the next lieutenant-colonel is void for remoteness (*In re Lord Stratheden and Campbell, Alt. v. Lord Stratheden and Campbell*, [1894] 3 Ch. 265). And where a testator bequeathed a fund in trust to provide annually a cup for ever to be given for the encouragement of yacht racing, it was held to be void for remoteness, as, though it might be beneficial to the public, the gift could not be upheld as charitable (*In re Nottage, Jones v. Palmer*, [1895] 2 Ch. 649; and see *Kingham v. Kingham*, 1897, 1r. R. Ch. 170).

See CHARITIES; see also on the whole subject, REMAINDERS; POWERS; PERPETUITIES; ACCUMULATIONS.

Exemplifications.—By the Crown Debts Act, 1801 (41 Geo. III. c. 90, s. 5), it is provided that where in any suit between party and party in the Court of Chancery in England, any decree or order is made for payment of or accounting for money, the Lord Chancellor shall upon application cause a copy of such decree or order to be exemplified or certified under the Great Seal to the Court of Chancery in Ireland; and that upon presentation of such exemplification to the Court of Chancery in Ireland, the Irish Court shall enrol the same and cause attachment or committal to issue thereon in order to enforce obedience thereto in all respects as if such decree or order had been originally pronounced by the Irish Court.

By sec. 6 of the same Act, a similar provision is made for enforcement of an Irish decree in England.

These provisions were subsequently extended to orders made on petition in cases of minors, bankrupts, idiots, or lunatics (5 Geo. IV. c. 3). For forms as regards lunatics, see Wood Renton on *Lunacy*, pp. 1038, 1039.

By virtue of the Supreme Court of Judicature Act, 1873, s. 76, the provisions of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), apply to judgments of the Chancery Division of the High Court in England, as well as to judgments of the Queen's Bench Division. The last-named Act, however, applies only to judgments (not orders) for "any debt, damages, or costs." It is no longer necessary, therefore, to proceed by exemplification in order to enforce a Chancery judgment for debt, damages, or costs. Where, however, a Chancery judgment directs an act to be done, such as payment of money into Court, or where an order is made, as distinguished from a judgment, an exemplification under 41 Geo. III. c. 90 is still necessary.

To procure the exemplification of a judgment or order of the Chancery Division in England, a petition must be presented to the Lord Chancellor, stating the purpose for which the exemplification is required. Upon this petition an order is drawn up by the Chancery Registrar. The exemplification is prepared by the solicitor (for form, see Sidney Smith's *Chancery Practice*, 7th ed., p. 890), certified by two of the masters of the Supreme Court (Central Office), signed by the Lord Chancellor, and passed under the Great Seal, and on transmission to the Chancery Division in Ireland is enrolled by order on petition.

To obtain the enrolment in England of a judgment or order of the Irish Court the Irish exemplification is produced and a petition, of course, presented at the Chancery registrar's department, upon which an order is made reciting the judgment or order, and directing the same to be "enrolled on the rolls of this Court" (Seton's *Judgments and Orders*, 5th ed., p. 170).

Exequatur.—Consuls cannot act until they have been duly recognised by the proper authorities of the country in which they have been appointed to reside (Hall, *Foreign Jurisdiction*, p. 16). To officers of the rank of consul or consul-general, and sometimes to vice-consuls in the regular service who have been appointed by an instrument (commission) signed by the Sovereign or President of his State, this recognition is in England given by the grant of an exequatur or letter patent issued from the Foreign Office and signed by the Sovereign. It guarantees to the consul the rights and privileges which holders of the post ordinarily possess, and ensures his recognition by functionaries of the State in which he is established. The grant of an exequatur is always officially notified in the *London Gazette*. Consuls who are not appointed by commission receive no exequatur, and a notice in the *Gazette* stating that their appointment has been approved serves as their official recognition.

The mode of granting the exequatur varies in different countries, being in some much more informal than in England. Thus the Austrian Government merely impresses the word "exequatur" and the imperial seal upon the consul's commission from his own Government, and the Russian and Danish Governments confine themselves to giving notice to the consul that he is duly recognised. An exequatur may at any time be withdrawn at the discretion of the Government of the State to which the consul is sent. In modern practice international courtesy requires, however, that opportunity be afforded to his Government to recall him. It is now more than forty years since the exequatur of a British consul was summarily withdrawn (see Hall, *International Law*, Oxford, 1895, p. 333). See CONSUL.

[*Authorities.*—Hall, *Foreign Jurisdiction of the British Crown*, Oxford, 1894; Rivier, *Droit des gens*, Paris, 1896; Twiss, *Law of Nations in Time of Peace*, Oxford, 1884; Spencer Walpole, *Foreign Relations*, London, 1882.]

Exercise.—As to the use of the term in connection with statutory powers, see Stroud, *Jud. Dict. s.v.* "Exercise"; and PURSUANCE, *post.* See also Stroud, *Jud. Dict. s.v.* "Carry on," and "Exercise"; and EXECUTION OF *Statutory Powers*, *supra*.

Exhausted—

Parish Lands.—See PARISH COUNCIL.

Tea.—See ADULTERATION; TEA.

Exhibit.—A document or other thing shown to a witness, and referred to by him in the course of his evidence. More particularly the term denotes some document referred to in an affidavit. Such a document should not be annexed to the affidavit or referred to therein as annexed, but as an "exhibit" (R. S. C., 1883, Order 38, r. 23). To identify and authenticate an exhibit, the commissioner for oaths before whom the affidavit to which the document is exhibited is sworn writes a certificate on same, in some such words as these: "This is the exhibit marked _____, referred to in the affidavit of A. B., sworn before me this _____ day of 18 ____"; and such certificate, signed by him, must be marked with the short title of the cause or matter in which the affidavit is being used (Order 38, r. 24). For marking each exhibit to an affidavit the commissioner is entitled to a fee of one shilling (R. S. C., App. N).

The effect of making any document an exhibit to an affidavit is the same as if such document had been copied out in the affidavit; therefore a person who is entitled to see the affidavit is equally entitled to see all documents exhibited thereto (*In re Hinchliffe*, [1895] 1 Ch. 120); but this rule does not apply to the case of an opinion by counsel which has been made an exhibit to an affidavit, filed in accordance with Order 16, r. 24, for leave to sue as a pauper (*Sloune v. Britain Steamship Co.*, [1897] 1 Q. B. 185).

In lunacy the practice is not to file exhibits with the affidavit to which they are exhibited, but this does not affect the right of a party to see such exhibits (*In re Hinchliffe*, *ubi supra*).

The costs of perusing exhibits to affidavits are only allowed on taxation by special order (*In re De Rosaz*, *Rymer v. De Rosaz*, 1883, 24 Ch. D. 684).

[*Authorities*.—Those cited, and Stringer, *Oaths and Affirmations*, 2nd ed., pp. 67, 68.]

Exhibitions.—Provision is made under the Patents Acts, 1883-88 and the International Convention, for the temporary protection of designs and inventions from the consequences of publication at exhibitions. See DESIGNS and PATENTS. See the Exhibition Medals Act, 1863 (26 & 27 Vict. c. 119), as to false representation as to grants of medals or certificates by the Commissioners for the Exhibitions of 1851 and 1862.

Exhumation.—See CORPSE.

Exile (from the Latin *exilium*, composed of *ex* and *solum*, soil, Skat)—Banishment from one's native soil, thus differing from expulsion (*q.v.*), which is the corresponding term applied to aliens. *Magna Carta* declares that no freeman shall be banished unless by the judgment of his peers or by the law of the land (c. 29), and the Habeas Corpus Act (31 Car. II. c. 2), that no subject of this realm who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or places beyond the seas.

It is believed that exile was first introduced into English law as a punishment in the time of Elizabeth, by a statute enacting that "such rogues as are dangerous to the inferior people should be banished the realm" (39 Eliz. c. 4). A later statute (18 Car. II. c. 3) gave power to the judges, at their discretion, either to execute or to transport to America for life the moss-troopers of Cumberland and Northumberland.

TRANSPORTATION in general was first legally regulated by a statute passed in 1824 (5 Geo. IV. c. 84), under which the Sovereign is enabled, by and with the advice of the Privy Council, to appoint places beyond the seas, either within or without the dominions of the Crown, to which offenders under sentence of transportation may be conveyed and kept to hard labour; and also, under the royal sign manual, to appoint places of confinement in England or Wales for the confinement of convicts under sentence of transportation, until they are transported or become entitled to their liberty, or shall be otherwise disposed of by order of the Secretary of State. Colonies showing an indisposition to receive transported convicts, the alternative of confinement within the realm, for the whole period of the term of punishment, became the practice.

Transportation was ultimately abolished by 16 & 17 Vict. c. 99, and

20 & 21 Vict. c. 3, the latter providing that no person should for the future be sentenced to transportation, and that any persons who, if those Acts had not been passed, might have been sentenced to transportation, should be liable to be sentenced to be kept in penal servitude for a term of the same duration. See Stephen, *Commentaries*, 1863, i. p. 153. See Coke on *Littleton*, 1823, 133 *a*, who defines abjuration as "a deportation for ever into a forreine land." See also CIVIL DEATH.

Transportation still forms part of the penal system of France, but political exile is believed to have passed out of the institutions of all European States except Russia, as shown by a recent notorious case.

Ex officio.—Powers or jurisdiction exercised by any official in virtue of his office are said to be exercised *ex officio*; *e.g.* the Attorney-General exhibits criminal informations *ex officio*, in respect of certain grave misdemeanours peculiarly affecting or endangering the Government. And so other criminal informations are filed by the Master of the Crown Office *ex officio* (see Step. *Black.*, 11th ed., vol. iv. p. 357; *cp.* also the use of the phrase in such juxtapositions as *ex-officio* judges of the Court of Appeal).

Ex parte.—This term is applied in law to a proceeding by one party in the absence of, and without notice to, the other. The various proceedings that can be taken *ex parte* are dealt with under their respective headings.

Expatriation—Renunciation of allegiance. At common law *nemo potest exuere patriam*. No British subject could renounce his British nationality before the Naturalisation Act, 1870 (33 & 34 Vict. c. 14). Under sec. 6 of this Act, "Any British subject who . . . may at any time after the passing of this Act when in any foreign State and not under any disability voluntarily become naturalised in such State, shall from and after the time of his so having become naturalised in such foreign State be deemed to have ceased to be a British subject and be regarded as an alien." Under sec. 4 a person who under British law is a British subject, but who is at the same time a foreign subject by foreign law, may, if of full age and not under any disability, make a declaration of alienage before any justice of the peace if in the United Kingdom, or if elsewhere in Her Majesty's dominions before any judge of any Court of civil or criminal jurisdiction, any justice of the peace, or any commissioner of oaths, or if out of Her Majesty's dominions before any British diplomatic or consular officer: and from and after the making of such declaration of alienage he ceases to be a British subject.

A British woman by marriage with the subject of a foreign State *ipso facto* loses her British nationality (Act of 1870, s. 10, subs. 1), and an infant born of British parents changes its nationality with the expatriation of its father or widowed mother, coupled with residence abroad with either of them (s. 10, subs. 3).

[*Authorities.*—See ALIEN; ALIENAGE; ALLEGIANCE; BRITISH SUBJECT; NATIONALITY.]

Expectancy, Estate in.—An estate in expectancy, as distinguished from an estate in possession, is an estate the right to the possession

of which will only arise at a future date, *c.g.* on the determination of a prior life estate. Expectancies may be remainders (see REMAINDERS), reversions (see REVERSIONS), or executory interests (see EXECUTORY INTERESTS; see also ESTATES).

Expectant Estates.—See EXPECTANCY; EXPECTANT HEIR; ESTATES.

Expectant Heir—The person upon whom property is likely to devolve after the determination of some prior interest. An expectant heir, in seeking to anticipate his expectancy by selling or mortgaging it, has always been so liable to be the victim of improvident and unconscionable bargains, as, for example, by selling at a gross undervalue or agreeing to pay interest at an exorbitant rate, that in such cases Courts of equity began at an early date to grant relief where it could not be shown by the person wishing to uphold the particular transaction that it was fair, just, and reasonable. "In the earlier cases," said Sir J. Leach in *Shelley v. Nash*, 1818, 3 Madd. 235, "it was held necessary to show that undue advantage was actually taken of the situation of such persons; but in more modern times it has been considered, not only that those who were dealing for their expectations, but those who were dealing for vested reversions also were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversions, the *onus* of proving that they had paid a fair price, and otherwise to undo their bargains and compel a reconveyance of the property purchased." The practice of granting relief in such cases has not been affected by the repeal of the Usury Laws (*q.v.*) or by the Sales of Reversions Act, 1867, which provides that no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest shall be set aside merely on the ground of undervalue; that statute "leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief" (per Lord Selborne in *Aylesford (Earl) v. Morris*, 1873, L. R. 8 (Ch. 490), nor has the *onus probandi* been in any degree shifted. "When the relative position is such as *prima facie* to raise this presumption [of an unconscionable bargain], the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (*ibid.*).

Where such a bargain is set aside, the practice is to order the securities given to stand as security for the sums actually advanced, with interest at five per cent. See CATCHING BARGAINS.

[*Authority.*—Seton, *Judgments and Orders*, 5th ed., vol. iii. pp. 1947 *et seq.*, where all the cases are cited.]

Expected to Arrive.—In *Bold v. Rayner*, 1836, 1 Mee. & W. 343, on the construction of a contract for the sale of goods "to be delivered from the *Speedy* or *Charlotte*, 'expected to arrive' about November or December next," it was held that the words "expected to arrive" were a mere representation and no part of the contract. (See also *Smith v. Mycra*, 1871, L. R. 7 Q. B. 139.)

Expedition.—See FOREIGN ENLISTMENT; RAID.

Expenses.—This term has a wide scope in the law of local government and public health in connection with the exercise by local authorities of their statutory powers. The phrase “expenses of management” is also a term of art. As to its meaning in sec. 58 (ix.) of the Settled Land Act, see *Clarke v. Thornton*, 1887, 35 Ch. D. 307. As to the “expenses of maintenance” of pauper lunatic (s. 287 (1) of Lunacy Act, 1890), see article ASYLUMS, vol. i. at p. 390. As to the expenses of prosecutions, see COSTS, in *Criminal Proceedings*, vol. iii. p. 512.

Experts.—See ASSESSORS; EVIDENCE.

Expiration.—The primary meaning of the word is any end whatever to existence, and the word applied to an estate for years may refer to the end of such an estate, or, in other words, the determination of a lease by one of two ways, viz.: (1) By effluxion of time, in which case expiration refers to the natural running out of the years for which the lease is granted. Cp. the common expression “to hold for the residue now unexpired of the term of years.” (2) By cesser of the estate, *i.e.* a premature end such as would be caused by forfeiture, and in this case expiration refers to the term or estate, and not to the years for which it is limited.

Circumstances may, however, arise to restrict the meaning of expiration to natural expiration, *i.e.* by effluxion of time as opposed to expiration by forfeiture. This is the construction put on the words in sec. 213 of the Common Law Procedure Act, 1852, “a tenant holding over after the expiration of his term,” and also on similar words in sec. 50 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), both sections dealing with jurisdiction in ejectment (see *Friend v. Shaw*, 1887, 20 Q. B. D. 374). Similarly, in Order 3, r. 6, R. S. C., in interpreting that part of the rule which deals with “(F) actions for the recovery of land with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired,” the Courts have held that “expired” has the same restricted meaning as in the older Acts, and refers to expiration by effluxion of time only, and not by surrender or forfeiture, and that in the latter case summary judgment under Order 14 is not obtainable. The older cases on the early statutes are—*Doe d. Tindal v. Roc*, 1831, 2 Barn. & Adol. 922; *Doe d. Carter v. Roc*, 1842, 10 Mee. & W. 670; *Hall v. Comfort*, 1886, 18 Q. B. D. 11; *Burns v. Walford*, W. N. 1884, 31; *Manseigh v. Rinnuel*, W. N. 1884, 34. And the same principle governs the present practice, these cases being recognised in *Arden v. Boyce*, [1894] 1 Q. B. 796, by the Court of Appeal. Where a lease of a dwelling-house for a term of seven years contained a proviso that if the rent were in arrear for a certain time the landlord might determine the term by notice to quit or might re-enter, and the landlord gave notice to quit and brought an action for recovery of the premises, the Court held that the claim of the landlord was in substance based on a forfeiture, and the case did not come within Order 3, r. 6 (F), and therefore the writ could not be specially indorsed, nor could he obtain summary judgment under Order 14 (*Arden v. Boyce*, *loc. cit.*; see also *Kemp v. Lester*, [1896] 2 Q. B. 162; *Annual Practice*, 1897, note to Order 3, r. 6).

Expiring Laws.—An Act of Parliament is annually passed for the continuance of a number of statutes which would otherwise have expired. When a bill for continuing an expiring Act does not pass before the Act expires, such continuing Act is, unless it contains an express provision to the contrary, deemed (*i.e.*, in this case, taken conclusively) to have effect from the date of the expiration of the Act intended to be continued, except as to penalties (48 Geo. III. c. 106).

Explosives.—After a considerable amount of prior legislation, in 1875 was passed the Explosives Act, 1875 (38 & 39 Vict. c. 17), which has been supplemented by many Orders in Council and Home Office Orders made under it. These Orders in Council and Home Office Orders are treated as a part of the Act, and cannot be challenged as *ultra vires* (s. 83). With the Act they constitute a code regulating in the interests of public safety the manufacture, sale, carriage, and import of the explosives included in the following definition, *viz.* : "Gunpowder, nitroglycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury, or other metals, coloured fires, and every other substance, whether similar or not to those already named, which is used with a view to produce a practical effect by explosion, or a pyrotechnic effect, and, in particular, fog-signals, fireworks, fuses, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions, and every adaptation or preparation of any of the substances already mentioned (s. 3).

The meaning of the term explosive may be extended by Order in Council to any substance which appears specially dangerous to life or property by reason of its explosive qualities, or risk of explosion in the process of its manufacture. An Order in Council has been made under this power, as to peric acid, in 1887 (No. 14, St. R. & O., Revised, vol. ii. p. 930).

Power is also given (s. 106) to define by Order in Council for the purposes of the Act the composition, quality, and character of any explosive, and to classify explosives. A general classifying Order was made in August 1875 (St. R. & O., Rev., vol. ii. p. 880), which has been superseded as to fireworks by an Order of December 1891 (St. R. & O., 1891, p. 277).

The Act is divided into four parts—(1) as to gunpowder; (2) as to other explosives; (3) as to the administrative machinery for enforcing the law; (4) as to legal remedies and proceedings, and various supplementary provisions.

GUNPOWDER.

Gunpowder may not be kept except (1) in a licensed or certified factory or store; (2) in premises registered for the purpose. The only exceptions to this are (*a*) keeping not over 30 lb. for private use, and not for sale; (*b*) keeping by a carrier for conveyance in accordance with the law. If the law is disobeyed, the owner or occupier of the place forfeits the powder and incurs a penalty of 2s. per lb. (s. 5).

The keeping of explosives for private use, and not for sale, is further regulated by Orders in Council of 1883 (No. 12, St. R. & O., Rev., vol. ii. p. 926) and 1886 (No. 13, St. R. & O., Rev., vol. ii. p. 929).

Special precaution must be taken to prevent accidents by fire or explosion, or the access of unauthorised persons to the premises (s. 23).

Manufacture.—The manufacture of gunpowder (except in small quantities as a chemical experiment) and the attendant processes may be

carried out only at a factory licensed under the Act if new (s. 4), or provided with a continuing certificate if lawfully existing when the Act passed (s. 14). The licence for a new factory or magazine is granted by the Home Secretary after compliance with the provisions of secs. 6-8 and the Home Office Order of 1876 (St. R. & O., Rev., vol. ii. p. 950), which involve deposit of plans and obtaining the assent of the local authority. The licence may be amended so as to authorise enlargement and alteration of the premises (s. 12), and does not lapse with change in occupancy or devolution of title to the premises (s. 13). Continuing certificates for magazines and factories existing in 1875 are granted under sec. 14 on the conditions specified in Part I. of Sched. I. of the Act.

Secs. 9-12 of the Act prescribe regulations for the user and management of licensed factories and magazines, and require the making of regulations for observance by the workmen. Where the Home Office and the occupier of the factory differ as to the propriety of a requisition of the former it is referred to arbitration (ss. 11, 25).

Storage.—Orders in Council may be made prescribing the situation and construction of stores for gunpowder for consumers, and the maximum amount to be stored, not exceeding two tons (ss. 16, 29).

Licences for stores are granted by the district council of the district in which the store is, in a form prescribed by the Home Office (ss. 15, 18). Licensed stores are subject to general rules as to user, and the occupier must make special regulations for observance by his workmen (ss. 17, 19). Stores existing in 1875 are legalised by a continuing certificate from the local authority (s. 20, Sched. I. Pt. II.).

Premises in which gunpowder is kept for retail must be registered with the local authority, and when registered are subject to regulations as to user, which limit the amount to be kept (ss. 21, 22, 24).

The local authority must keep a register of licences open to inspection by any ratepayer of the licensed stores and registered premises (s. 28). The licence or registration gives only a personal and inalienable right to the licensee or person registered, but in case of death, etc., no penalties are incurred during the period requisite for getting new licence or registration (ss. 18, 21, 29).

Stores licensed for gunpowder only are subject to an Order in Council of 1875 (St. R. & O., Rev., vol. ii. p. 900), and floating magazines to an Order of the Home Office of 1875 (St. R. & O., Rev., vol. ii. p. 932).

The fees for Home Office licences for factories, magazines, or importation are prescribed by the Secretary of State, under Orders of 1882 and 1884 (St. R. & O., Rev., vol. ii. pp. 950, 951), and those for local licences and certificates for stores are not to exceed 5s. for licence or 2s. 6d. for certificate (ss. 15, 20), and for local registration are not to exceed 1s. (s. 21).

Sale.—Gunpowder may not be hawked, sold, or exposed for sale in a highway or public place (s. 30), nor sold to children under thirteen (s. 31), and must be sold in closed labelled packages (s. 33).

Its sale, with that of other explosives, is also regulated by Order in Council No. 9 of 1875 (St. R. & O., Rev., vol. ii. p. 922).

OTHER EXPLOSIVES.

General.—The provisions of the Act as to gunpowder extend to all other "explosives," with certain modifications as to the maximum amount which may be kept or conveyed for private use (ss. 40 (4), 41), and other details.

General rules were made in 1875 for factories and magazines for explosives

(St. R. & O., Rev., vol. ii. pp. 884, 888), and as to small firework factories in 1891 (St. R. & O., Rev., vol. ii. p. 891).

Stores licensed for mixed explosives are regulated by Orders in Council of 1875 No. 6 and of 1883 No. 6 *a* (St. R. & O., Rev., vol. ii. pp. 904, 912), and floating magazines for such explosives are regulated by Home Office Order No. 2 of 1875 (St. R. & O., Rev., vol. ii. p. 934).

Premises registered for mixed explosives are governed by an Order in Council of 1896 (St. R. & O., 1896, p. 95), which supersedes previous Orders.

An importation licence from the Home Secretary is necessary for the importation of dynamite or gun-cotton, or any explosive (except gunpowder, caps, fireworks, and prescribed and exempted explosives), and no owner or master of a ship may deliver such explosives to a person who has not an importation licence (s. 40 (9)). The only exemption Order is one of 1875 (No. 10, St. R. & O., Rev., vol. ii. p. 923).

Special.—The manufacture, keeping, importation, conveyance, and sale of any specially dangerous explosive may be prohibited by Order in Council either absolutely or except on Home Office licence, or subjected to conditions and restrictions (s. 43). Orders in Council were made in 1884 (10 *a*) requiring an importation licence for fireworks (St. R. & O., Rev., vol. ii. p. 924), and in 1894 (St. R. & O., 1894, p. 77) as to fireworks containing sulphur mixed with chlorates.

PETROLEUM, ETC.

The keeping of petroleum, naphtha, and like inflammable substance may constitute a public nuisance (*R. v. Lister*, 1856, 26 L. J. M. C. 196).

Under the Petroleum Acts, 1871 and 1879 (34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47), and the Petroleum Hawkers Act, 1881 (44 & 45 Vict. c. 67), special regulations are in force with respect to petroleum and similar oils, *i.e.* rock oil, Rangoon oil, Burmah oil, oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, and products of petroleum or any such oils.

Under the Act of 1871 such oils to fall within the Act must give off inflammable vapour at a temperature less than 100° Fahr. (34 & 35 Vict. c. 105, s. 3). Under the Act of 1879 the flash point was altered to 73° Fahr., and the test to be applied was prescribed (ss. 2, 3, Sched. I.), and provision made for verifying and stamping the test apparatus (s. 3; St. R. & O., Rev. vol. v. p. 160). All substances within the Act kept, carried, sold, or exposed for sale must be in a vessel distinctly labelled highly inflammable (1871, s. 6).

No such substance may be kept in any place except under a licence from the local authority (1871, ss. 7, 8, 9), *i.e.* in the country, the municipal corporation or urban district council or rural district council; or in harbours under commissioners the harbour authority; and in the county of London, the County Council, except in the city, where the mayor and corporation act (1871, s. 8; 56 & 57 Vict. c. 73, ss. 21, 27).

The licence is not needed (whether the substance is kept for sale or private use) if it is in separate glass, earthenware, or metal vessels not containing more than a pint, and securely stopped, provided that the aggregate of the vessels kept does not exceed three gallons (1871, s. 7). Hawking in a cart was held (*Coleman v. Goldsmith*, 1879, 43 J. P. 718) to be keeping in a place. But under the Act of 1881 a person licensed to keep petroleum, etc., may hawk it under the regulations prescribed by that Act (ss. 1, 2, 3), except in boroughs where such hawking is for the time being lawfully forbidden (s. 5). The Act of 1881 includes for its purposes every form of

petroleum, and not merely that to which the Acts of 1871 and 1879 applied (s. 2).

Officers of these authorities are entitled to test petroleum, and to see a dealer's stock of it (ss. 11, 12), and a Court of summary jurisdiction may grant a warrant to search for it (s. 13).

Penalties for breaches of the Acts are provided and are recoverable summarily before justices.

Under sec. 14 of the Act of 1871, Orders in Council may be made extending the Acts of 1871 and 1879 to other substances. This has been done as to carbide of calcium (St. R. & O., 1897, No. 8171). Parliamentary inquiry is at present proceeding as to the efficiency of these Acts to protect the public from explosion or ignition of petroleum and like substances.

CONVEYANCE.

The packing of gunpowder for conveyance must be in accordance with the rules laid down in sec. 33 of the Explosives Act, 1875, as modified by the Home Office under the powers given by that section in 1890 (St. R. & O., 1890, p. 641). It must be labelled "Gunpowder."

The packing for conveyance of other explosives is regulated by Home Office Orders of 1875, 1889 (St. R. & O., Rev., vol. ii. pp. 937, 944), and 1893 (St. R. & O., 1893, p. 289).

For every district in England which has a harbour authority, the authority must make by-laws as to the conveyance, loading, etc., of gunpowder and other explosives within the harbour. Where there is no harbour authority the Board of Trade may make such by-laws (s. 34). Railway and canal companies have to make similar by-laws for their premises and systems (cp. Hodge's *Railways*, 7th ed., i. 584, ii. 319). A similar provision is made (s. 36) as to by-laws by occupiers of wharves or docks not subject to by-laws, under secs. 34, 35; and the conveyance of gunpowder to and from places not affected by the by-laws already specified is regulated by by-laws made by the Home Secretary in 1875 (St. R. & O., Rev., vol. ii. p. 944).

The confirmation and publication of rules and by-laws is prescribed by sec. 38.

Harbour authorities and canal companies can provide and charge for vehicles and vessels for conveyance, loading, and unloading of gunpowder (s. 71).

No person is entitled to carry by rail or require a railway company to carry any aquafortis, oil of vitriol, gunpowder, lucifer matches, or other goods which in the opinion of the company are dangerous. The company may refuse to take, or require the opening of a parcel if they think it dangerous; and a penalty is incurred if dangerous goods are sent without their nature being marked, or other notice to the company's servants (8 & 9 Vict. c. 20, s. 105; *Hearne v. Gorton*, 1859, 28 L. J. M. C. 216).

It is a misdemeanour to send an explosive substance by post, and the packet may be detained and the offender prosecuted summarily or on indictment (47 & 48 Vict. c. 76, s. 4).

Carriage by Sea.—The provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 446–450), impose restrictions on the carriage in a British or foreign ship of any dangerous goods, i.e. aquafortis, vitriol, naphtha, petroleum, lucifer matches, and gunpowder, and nitroglycerine, and any other explosives within the Explosives Act, 1875, and any other dangerous goods. The master or owner may refuse to carry dangerous goods, and may have any package opened to see if its contents are dangerous

(s. 448). He may also throw overboard any unmarked dangerous goods (57 & 58 Vict. c. 60, s. 448 (2)), and may search for any such goods if he has reasonable cause to suspect they are concealed on board (46 & 47 Vict. c. 3, s. 8 (2)). Dangerous goods may not be tendered for carriage or carried unless their nature is distinctly marked on the outside of the package, and written notice of their nature is given to the master or owner when or before they are shipped. Deliberately sending or attempting to ship dangerous goods under a false description, or misdescribing the sender or carrier, entails a penalty of £500 (s. 447). Dangerous goods shipped, or attempted to be shipped, in breach of the Act, may be forfeited by any Court of Admiralty jurisdiction, with or without notice to the owner of the goods (s. 448). At common law the shipper seems to be indictable (*Williams v. East India Co.*, 1802, 3 East, 192, 201). Masters and owners of ships must, on importing explosives, other than gunpowder, fireworks, caps, and certain others, comply with sec. 409 of the Explosives Act, 1875, which requires an importation licence to authorise the landing of such explosives. Exporters or shippers of explosives as defined by the Act of 1875, or the Orders in Council, must, also before shipmen make entry at the customs of every cask or package containing such explosives, and in the entry, whether outwards or coastwise, must correctly describe the explosive in accordance with the definition, or he incurs a forfeiture of £100 and forfeiture of the cask or package (39 & 40 Vict. c. 36, s. 137) if the entry is not made or is false in any particular. It is recoverable by information in the High Court, or before a Court of summary jurisdiction (39 & 40 Vict. c. 36, ss. 255-257; 42 & 43 Vict. c. 21, s. 11).

The masters of ships which carry any substance within the Petroleum Acts, 1871 and 1879 (34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47), must, on arrival at a port, give notice to the harbour authority of the nature of their cargo, and the ships are subject to by-laws made by the harbour authority of any port to which they go, and confirmed by the Board of Trade regulating the places in which such vessels are to lie or be moored and land their cargo, and the line and mode of the precautions on landing. Penalties are provided for breach of by-laws, and the Board of Trade can make by-laws themselves on default by the authority (34 & 35 Vict. c. 105, ss. 4, 5). Independently of the statutory provisions already detailed, persons who have explosives on their land for their own purposes are responsible for any injuries thereby caused to others, and except by independent and wrongful acts of strangers, on the doctrine of *Rylands v. Fletcher*, 1868, L. R. 3 H. L. 330; see Beven on *Negligence*, 2nd ed., 562, 594.

Persons other than carriers are also liable for any negligence in the conveyance or carriage of explosives which causes injury to person or property.

Carriers of explosives are liable to strangers for negligence in carriage; their obligations to the owner depend on the contract of carriage.

The Explosives Act, 1875 (38 & 39 Vict. c. 17), by sec. 102 specifically reserves the ordinary rights of suit for tort, nuisance, or otherwise in respect of dealings with explosives within the Act.

• SUPERVISION.

Central.—The Home Office is the central department for administering the Act. The duty of inspecting factories, magazines, and stores devolves on Government Inspectors, who have large powers of entry, and are bound to report all dangerous practices, etc. An annual report is made up and laid before Parliament (ss. 55-57; see Parl. Pap. 1897, C.). In the case

of railways and ships, the Board of Trade may order the inspectors of railways or shipping officers to act as inspectors under the Act (s. 58), and inspectors of mines may be given a like duty by the Home Office as to magazines or stores established for mines (s. 59).

Under sec. 63 of the Act notice of any accident by explosion or fire in a factory, magazine, or store, and of any such accident causing loss of life or personal injury in or about registered premises, or on a carriage, ship, or boat conveying, unloading, or receiving an explosive, must be given to the Home Office, subject to an Order in Council of 1875 (No. 11, St. R. & O., Rev., vol. ii. p. 925).

Where an inquest is held in consequence of such accident, the coroner must give notice to the Home Office, and adjourn the inquest till the Home Office sends a representative (s. 65), and in serious cases the Secretary of State may direct an inquiry by a Government Inspector, or a more formal investigation by a person with legal or special knowledge (s. 66).

Local.—The local control of explosives is intrusted—

- (1) Where there is a harbour district, to the harbour authority;
- (2) In the city of London, to the corporation;
- (3) In the rest of the administrative county of London, to the County Council;
- (4) In boroughs not assessed for county rate, to the corporation;
- (5) In other cases, to the County Council (see 51 & 52 Vict. c. 41, s. 3); where a borough or urban district has not obtained an order constituting it, the local authority (s. 67).

The business of the local authority, besides licences and registration (*supra*), is to appoint and pay an inspecting officer, and provide magazines in the interest of public safety (s. 72). The officers of the central and local authorities and the police have, under secs. 73–76, wide powers of entry and search and inspection, and may take samples, for payment, of any explosives.

LEGAL PROCEEDINGS.

Besides the common law liabilities to indictment in respect of nuisances, or other offences as to explosives (see 1 Russell on *Crimes*, 6th ed., 734–737), which are expressly preserved by sec. 102, there are innumerable penalties created by the Explosives Act, 1875, and the Orders in Council, Home Office rules, by-laws, and regulations made under it. All may be recovered either on indictment or summarily, subject to the defendant's election to be indicted or to his right to appeal to Quarter Sessions (ss. 91, 92, 93). If the offence is one tending to cause explosion, the offender can be arrested without warrant (s. 78), and if an act or neglect primarily punishable by fine only was wilfully done, and endangered life or limb, the offender can be imprisoned for not over six months (s. 79). Where an occupier is rendered liable by the Act for an offence which has been in fact committed by another, he can obtain exemption by proof of the fact (s. 87).

INSURANCE.

The risk of damage to premises by the explosion of gas, petroleum, or other explosives there kept is not a risk included in a policy of insurance against fire, except in the case of express stipulation, unless there has been actual ignition, and the amount recoverable is limited to the damage caused by the fire (*Everett v. London Assurance*, 1865, 19 C. B. N. S. 126; *Stanley v. Western Insurance Co.*, 1867, L. R. 3 Ex. 71; *Taunton v.*

Royal Insurance Co., 1864, 33 L. J. Ch. 406; *Hobbs v. Guardian Fire, etc., Insurance Co.*, 1885, 12 Canada S. C. 631).

If the keeping of the explosives on the premises is contrary to law, nothing can be recovered on the policy, whether it contains a specific stipulation or not, the risk being extra hazardous, and the act of keeping illegal. English policies frequently have a clause including risk by explosion, except of gas in domestic use, and risk by storage of gunpowder and the like (see *M'Ewan v. Guthridge*, 1860, 13 Moo. P. C. 304; *Beacon Fire Insurance Co. v. Gibb*, 1862, 1 Moo. P. C. N. S. 73).

USE OF EXPLOSIVES FOR CRIMINAL PURPOSES.

Besides the provisions of the administrative Acts already detailed, there are numerous enactments punishing the use of explosives for the purpose of committing offences against persons or property.

As to causing death by explosives, see HOMICIDE.

It is felony, punishable by penal servitude for life, or not less than three years—

1. To destroy any building by explosives, with intent to commit murder (24 & 25 Vict. c. 100, s. 12);

2. To burn, maim, disfigure, disable, or do any grievous bodily harm to another by the explosion of gunpowder or any other explosive substance;

3. To explode any such substance with intent to burn, etc., . . . any other person, or to put or place anywhere, or send, deliver, or apply to, or cast or throw at, such substance at another with such intent (c. 100, ss. 28, 29);

4. Unlawfully and maliciously to cause by any explosive an explosion of a nature likely to endanger life or cause serious injury to property, whether the injury is caused or not (46 & 47 Vict. c. 3, s. 1);

5. Unlawfully and maliciously by exploding any explosive to destroy, throw down, or damage, wholly or partially, a dwelling-house in which any person is, or any building whereby the life of any person may be endangered (24 & 25 Vict. c. 97, s. 9). This offence is not committed by shooting into a house, even if damage is done (*R. v. Brown*, 1863, 3 F. & F. 821).

It is felony, punishable by penal servitude from three to twenty years—

6. For any person within (or if a British subject without) the Queen's dominions (a) to do any act with intent to cause or to conspire to cause by an explosive substance in the United Kingdom of a nature likely to endanger life or cause serious injury to property; (b) to make or have in his possession or under his control an explosive with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom, or to enable another person by means of such explosive to do so (46 & 47 Vict. c. 3, s. 3).

It is immaterial whether the explosive explodes or not, or whether injury to person or property is caused. The explosive seized is to be forfeited.

It is also felony, punishable by penal servitude from three to fourteen years—

7. To place an explosive in, upon, against, or near a building, ship, or vessel, with intent to cause bodily harm, whether the explosive goes off or not, and whether bodily harm is or is not done (24 & 25 Vict. c. 100, s. 30);

8. To make or knowingly have in possession or under control an explosive under circumstances which create a reasonable suspicion that such possession or control is for an unlawful object, unless the defence

can dispel this suspicion. On a charge for this offence the defendant and his wife are competent but not compellable witnesses (46 & 47 Vict. c. 3, s. 4);

9. Unlawfully and maliciously to place or throw in, into, upon, under, against, or near any building, any explosive, with intent to destroy or damage the building or fixtures or goods or chattels therein, whether damage is or is not caused (24 & 25 Vict. c. 97, s. 10). As to the essentials of the offence, see *R. v. Sheppard*, 1868, 11 Cox C. C. 302.

10. It is a misdemeanour, punishable by imprisonment with or without hard labour for not over two years and (or) fine, knowingly to have in possession or to make or manufacture any explosive with intent to use it for the purpose of committing a felony or to enable another person to use it for that purpose (24 & 25 Vict. c. 97, s. 54; 24 & 25 Vict. c. 100, s. 64).

In the case of each of these offences, the Court may, instead of penal servitude, impose imprisonment with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1). The Court may order the whipping of males under sixteen who commit offences 1., 2., 5., 7., 9., and 10.

Offences 1. to 5. are not triable at Quarter Sessions (5 & 6 Vict. c. 38). Accessories to offences against the Acts of 1861 are dealt with either under the accessory clauses of these Acts or the Accessories and Abettors Act, 1861. Accessories to offences under the Act of 1883 are punishable under sec. 5 of that Act, whether they act within (or if British subjects without) the United Kingdom. See ACCESSORY.

In the Acts of 1861 explosives are not defined, and the expression used is "gunpowder or other explosive."

In the Act of 1883 (s. 9 (1)) explosive substance is defined as including materials for making an explosive substance, and the whole or any part of any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing or aiding in causing any explosion in or with an explosive substance (*R. v. Charles*, 1892, 17 Cox C. C. 499).

In the case of offences under the Act of 1883 a prosecution can be instituted only by or by leave of the Attorney-General (46 & 47 Vict. c. 3, s. 7), who (s. 6) can also, where he believes a crime against the Act has been committed, order an inquiry before a justice on oath with respect to the supposed crime, though no person is before him charged with the crime. The justice can compel the attendance of witnesses, arrest them if they abscond, and make them answer incriminating questions (s. 6). The procedure is exceptional in England, though similar to that used in Scotland and to that in force in Ireland under the Criminal Law and Procedure (Ireland) Act, 1887.

Indictments under the Act of 1883 differ from those under the other Acts in that the same criminal act may be charged as constituting different offences, and the prosecutor is not put to his election as to the count on which he will proceed (46 & 47 Vict. c. 3, s. 7 (2)).

Persons charged under the Act of 1883 with an offence outside the United Kingdom may be tried wherever they are arrested in England (s. 7 (3)), and the provisions as to search for and seizure of explosives in the Explosives Act, 1875 (*vide supra*), are applied to searches, etc., in the case of crimes within the Act.

As to these offences, see Archbold, *Cr. Pl.*, 21st ed.; Russell on *Crimes*, 6th ed., vol. ii. pp. 397, 790; vol. iii. pp. 279-303.

Exposing—

Article of Food.—See ADULTERATION; FOOD.

Child.—See CRUELTY to Children.

Person.—See INDECENCY.

Ex post facto.—Blackstone says laws are made *ex post facto*; “when, after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust” (see Blackstone’s *Commentaries*, vol. i. p. 46).

An *ex post facto* law may be distinguished from a retrospective law. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law. Laws are not to be considered *ex post facto* when they modify the rigour of the criminal law, but only when they create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction (see *Phillips v. Eyre*, 1870, L. R. 6 Q. B. at p. 26, which refers to the case of *Calder v. Bull*, 1798, 3 Dallas (U.S.) at p. 391).

[*Authorities.*—Blackstone, *Commentaries*; Harcastle, *Statute Law*, 2nd ed.]

Express—

Colour.—A term of the old common law pleading. In order to give sufficient colour to the plaintiff’s claim in an action for trespass to land, where the defendant wished to confess and avoid the claim, it was necessary to set up a fictitious conveyance from the person seised in fee to the plaintiff. This was called giving “express colour” to the plea. It was rendered unnecessary and abolished by secs. 49, 64 of the Common Law Procedure Act, 1852. See 1 Chit. *Practice*, 7th ed., 556; Report of Common Law Commissioners (1850), p. 24.

Malice.—See MALICE.

Expulsion—

From Meeting.—In the case of all meetings of any public body persons not members of the body are entitled to be present only on sufferance, and may be excluded and expelled by order of the chairman and resolution of the body. They are mere trespassers, when forbidden to enter or directed to retire; and the necessary force may be employed for their removal. The Home Office has in some instances sanctioned a by-law imposing a penalty on strangers disturbing or refusing to retire from meetings of a London vestry.

Persons such as members of any corporation, or council, or of a joint-stock company cannot lawfully be excluded or expelled from a meeting, except under a by-law validly made for the purpose (*Faughan v. Hampson*, 1875, 33 L. T. 15).

In the case of all other meetings, whether they be termed public or not, the conveners of the meeting stand in the position of licensors to the persons attending (*Wood v. Leadbitter*, 1845, 13 Mee. & W. 838), and

may revoke the licence and expel any person who creates a disturbance or is found otherwise objectionable; but this does not entitle the chairman of the meeting to give the offender into custody unless a breach of the peace is committed (*Wooding v. Oaley*, 1839, 9 Car. & P. 1). If excessive force is used in expulsion, civil or criminal proceedings for assault and false imprisonment will lie (*Lucas v. Mason*, 1875, L. R. 10 Ex. 251).

From Office.—Many public offices are held *ad vitam aut culpam* or *dum bene se gesserit*, or for a fixed term; but the question occasionally arises whether the official can be expelled from office before the end of his term.

Servants of the Crown.—Except the judges and Auditor-General, whose tenures of office are secured for constitutional reasons, most if not all servants of the Crown may be dismissed from office at any moment without reason assigned and without compensation. It is immaterial whether the office is political, civil, naval, or military (*Shenton v. Smith*, [1895] App. Cas. 229). But the right to dismiss at pleasure may be excluded by special contract or by the statutes applying to the office (*Gould v. Stuart*, [1896] App. Cas. 575; *Dunn v. R.*, [1896] 1 Q. B. 116; *De Dohsé v. R.*, [1896] 1 Q. B. 117 n.).

House of Commons.—The position of member of the House of Commons is regarded as a public office which the member cannot resign by any direct method, though he can vacate his seat by accepting office under the Crown (see CHILTERN HUNDREDS). But he may be expelled by resolution of the House, which cannot be questioned by any Court of law (see May, *Parl. Pr.*, 10th ed., 53–55).

In the case of colonial Legislatures this power has in certain cases been challenged (see *Doyle v. Falconer*, 1866, L. R. 1 P. C. 328; *Barton v. Tyler*, 1886, 11 App. Cas. 197; *Fielding v. Thomas*, [1896] App. Cas. 600).

Municipal Corporations.—No municipal corporation (including county, borough, district and parish councils, and poor law and education boards) has under any modern statute the right to expel a member, except in certain specified cases in which the law declares the member to have vacated his seat or empowers the council to declare it vacant (*e.g.* 45 & 46 Vict. c. 50, ss. 11, 39; 56 & 57 Vict. c. 73; and the Corrupt Practices Acts). It is doubtful whether they have power by by-law, resolution, or otherwise, even temporarily to exclude a refractory or uproarious member from their meetings. At common law there was and still continues a power of amotion of a corporator for reasonable cause, such as corrupt or dishonest conduct (*R. v. Heaven*, 1788, 2 T. R. 772; 1 R. R. 619; *Booth v. Arnold*, [1895] 1 Q. B. 571, 578). It was exercised so recently as 1872 (see *Booth v. Arnold*, [1895] 1 Q. B. 578). Hereon see Kyd on *Corporations*, 2, 65.

Sheriffs, Coroners.—The sheriff is an officer of the Crown appointed during pleasure (50 & 51 Vict. c. 55, s. 6, Sched. I.), and may be dismissed at the will of the Crown (Churchill on *Sheriffs*, 2nd ed., 23).

The coroner, who was appointed formerly by the freeholders, and now by town and county councils, has a freehold in his office, subject to removal by the Lord Chancellor or the High Court for misconduct (50 & 51 Vict. c. 71, s. 35). See CORONER.

From the Realm.—The law of England differs from that of most European States in that it contains no clear or definite provisions for the banishment from the realm of subjects or the expulsion of aliens.

Subjects.—Under the old common law a criminal who had taken sanctuary could be required to abjure the realm, and was treated as an

outlaw if found within it after the time limited for his exit. This power lapsed with the abolition of sanctuary. See ABJURATION; SANCTUARY.

For the rest the rule of the common law is thus correctly summed up: "No power on earth except the authority of Parliament can send a subject of England, not even a criminal, out of the land against his will" (1 Hawk. P. C. bk. ii. c. 33, s. 17).

BANISHMENT, except after trial and verdict, was forbidden by Magna Carta (c. 29). There is no evidence that it was ever awarded as a sentence at common law; and in *Countess of Portland v. Prodgers*, 1689, 2 Vern. 104, it was declared that it could be imposed only under statutory authority. Expulsion for crime was effected under statutory authority by a series of Acts beginning with 38 Eliz. c. 4 as to vagrants, and culminating with the Transportation Acts. See TRANSPORTATION; PENAL SERVITUDE.

It was also a common practice to grant a pardon conditional on departing from the realm; but this rested on the assent of the offender and not on statute (Kelyng, *Crim. Cas.*, ed. Loveland, p. 45), though it is recognised as early as 1679 (Habeas Corpus Act, ss. 11, 12, 13), and in the *Canadian Prisoners' case*, 1839, 9 Ad. & E. 783. See PARDON.

There is an obvious objection on grounds of international law and policy to an extended use of any power of expelling British subjects into foreign countries. This does not apply to the provisions for the surrender of fugitives from foreign or colonial justice, but it has been recognised that statutory authority was required for even this salutary concession. See DEPORTATION; EXTRADITION; FUGITIVE OFFENDER.

Aliens.—Magna Carta (25 Edw. I. c. 30) gives what has been described as a statutory safe conduct to foreign merchants (1 *Co. Inst.* 57). And the policy of English legislation has been to accord to an alien who has once entered the realm all the rights before the law of a subject, except electoral rights; and there has not in modern times been any pretence, except in the case of an alien enemy, or under statutory authority of a legal right, to expel an alien from the realm. And it would appear that except in these cases the alien would be entitled to vindicate his liberty by writ of habeas corpus (see *Proc. in Chancery*, cii. ciii. *temp.* Edw. IV.), as is expressly conceded in the case of an application for EXTRADITION (*q.v.*). There are extant opinions of the law officers as to the illegality of seizing or expelling even a foreign criminal (1769, Redington, Cal. St. Pap. No. 1177; 1761, Cal. St. Pap., Home Office, No. 196; and see *In re Adam*, 1837, 1 Moo. P. C. 460).

In *Musgrove v. Chung Terong Toy*, [1891] App. Cas. 272, the Judicial Committee emitted a dictum that an alien has no right enforceable by action to enter the realm. But this dictum, besides being unnecessary to the decision, is difficult to justify by any ordinary principles of law, and when analysed amounts to the assertion of a royal prerogative to override the ordinary law in the case of aliens. An alien friend can be detained under 6 & 7 Will. IV. c. 11, only for the purposes of obtaining the details required by the Act. When it has been desired to have administrative powers to expel aliens, resort has always been had to legislation in the various temporary alien Acts. And the only statutory authority warranting removal of an alien from the realm, except the Extradition Acts, is that of the Roman Catholic Emancipation Act, 1830 (10 Geo. IV. c. 7, ss. 28-36), with reference to made religious orders of the Roman communion, which, though unrepealed, is ignored. The opinion of the Judicial Committee does not pretend to rest on any authority, and ignores the law and practice as to Habeas Corpus, and in particular the case of the negro Somerset—who was an alien (1771, 20 St. Tri. 1, 15). Nor can the

plea of act of State be vouched in justification of such exclusion or expulsion of an alien amy. See ACT OF STATE. This subject was discussed in detail in the *Law Quarterly Review* for 1890, vol. vi. at p. 27 as to aliens, and at p. 388 as to subjects; and see *L. Q. R.* 1891, vol. vii. p. 299. See EXCLUSION.

Ex relatione.—Criminal and quo warranto informations which are partly at the suit of the Sovereign, and partly at that of a subject, are filed *ex relatione*, on the information or relation, of some private person, or common informer, who is called the relator. The Sovereign in such cases is only the nominal prosecutor, and not, as in informations filed *ex officio* by the Attorney- or Solicitor-General, the real prosecutor in his own suits. They are filed by the Queen's Coroner and Attorney in the Court of Queen's Bench, usually called the Master of the Crown Office, who is for this purpose the servant of the public.

In Chancery, too, similar suits were formerly instituted, but by Order 1, r. 1, of the Judicature Act, 1873, all suits previously commenced by information are instituted by action. As to the authority of the Attorney-General for bringing such actions, and the regulations to be observed, see Pemberton on *Judgments, etc.*, 4th ed., p. 2.

By 4 & 5 Will. & Mary, c. 18, the Queen's Coroner and Attorney is restrained from exhibiting, receiving, or filing any criminal information without order given by the Court of Queen's Bench in open Court; and by Crown Office Rules, 1886, r. 46, both in criminal and quo warranto informations, the relator must enter into a recognisance of £50 to prosecute such information.

The phrase "*ex relatione*" is also used in legal reports to express the fact that a case has been reported on a third party's information. See also INFORMATIONS.

[*Authorities.*—Shortt, *Informations, etc.*; Crown Office Rules, 1886.]

Extend to and Include.—This phrase in an interpretation clause means that in addition to the ordinary signification which the particular word defined bears, it is to have the meanings given to it by the interpretation clause (per Brett, M. R., in *Portsmouth (Mayor) v. Smith*, 1883, 53 L. J. Q. B. at p. 95). The words "shall include" are of wider import than "shall mean" (*Dyke v. Elliott, The Gauntlet*, 1872, L. R. 4 P. C. 184, 192).

[*Authority.*—Stroud, *Jud. Dict.*]

Extension—

Of Judgments.—See JUDGMENT.

Of Patents.—See PATENTS.

Of Time.—See TIME.

Extent.—The writ of extent is a writ of execution against the lands and goods of a Crown debtor by means of which the payment of all debts of record (see 33 Hen. VIII. c. 39 and 13 Eliz. c. 4) due to the Crown can be enforced. At one time it seems to have been contended by Mr. West, who was a great authority on the subject of extent, that it was not one of the prerogative writs, and that the right to it did not exist in the king at

common law, but was given by secs. 50 and 53 of the Statute 33 Hen. viii. c. 39 (*R. v. Bulley*, 1727, Bunb. 233; *R. v. Bickley*, 1817, 3 Price, at p. 463; 18 R. R. 634); but this is clearly wrong, and a form of the writ of extent as used in the 29 Edward I. will be found in Price's *Exchequer Practice* (*Sampson of Gretham's case*, Price, pp. 598-600). There are different varieties of the writ according to the circumstances under which it is desired to make use of this particular remedy. A writ of "extent in chief" is issued at the instance of the Crown against the body, lands, and goods of the Crown debtor himself. A writ of "extent in chief in the second degree" and a writ of "extent in aid" are both writs issued against the debtor of a Crown debtor. The former is, however, issued by the Crown at its own instance, and the latter at the suit of the Crown debtor (*R. v. Bell*, 1823, and *R. v. Shackle*, 1823, 11 Price, 772). When once an extent in aid has issued it has all the force and all the incidents of an extent in chief. By the reign of George III. Crown debtors had discovered that an extent in aid formed a convenient means of collecting their own private debts, and much larger sums than were due to the Crown were recovered by Crown debtors by means of this writ. A stop was put to this practice by 57 Geo. III. c. 117, which provided that the amount of debt due to the Crown stated and specified in the *fiat* should be indorsed on the writ as the sum to be levied by the sheriff. If the debt due from the debtor of the Crown debtor was less than the amount due to the Crown by the Crown debtor, then the amount of the debt due to the Crown debtor was to be indorsed on the writ (s. 1). The debtor to the Crown was not to be prejudiced in recovering the remainder of the debt due to him (s. 3). There was also a provision in sec. 4 that extents in aid were not to be sued out by simple contract debtors of the Crown, or except in certain specified cases by persons indebted to His Majesty by bond. Sec. 6 provides that persons imprisoned under a writ of *capias* on any extent or extent in aid may apply to the Court of Exchequer for their discharge upon giving one month's notice in writing to the person to whom the debt is due of their intention to make the application; and if the Court is satisfied that they have made a full discovery of all their property, or it shall otherwise appear reasonable and proper to the Court, they may be liberated by means of the writ of *supersedeas quoad corpus*. And in order further to check the issuing of extents in aid for private purposes, a rule of Court was made, June 22, 1822, to the effect that no *fiat* should be granted for an extent in aid except on an affidavit that unless the process of extent for the debt due be forthwith issued, the debt due to the Crown from the party applying will be in danger of being lost to the Crown (see 11 Price, p. 160). 57 Geo. III. c. 117 and the above rule were held not to apply to extents in chief in the second degree (*R. v. Bell*, 1823, and *R. v. Shackle*, 1823, 11 Price, 772). The issue of the writ and the procedure thereon is now regulated by the rules of 1860 (St. R. & O., Rev., vol. ii. p. 644), except in so far as it is modified by Order 68, r. 2, of the Rules of the Supreme Court. An extent was usually preceded by a *scire facias*, which gave the debtor an opportunity of contesting the existence of the alleged debt. Previous to 28 & 29 Vict. c. 104, a commission (for form of commission, see § Jurist, 238, note to *R. v. Kyle*) to find a debt due to the Crown was necessary in all cases where the alleged debt was only a simple contract debt before the issue of an extent and the proceeding by *scire facias*, and it was not until after inquisition returned that the writ went. Care must be taken to distinguish between the inquisition to find a debt due, and the subsequent inquisition taken on the extent issued to find

and seize debts found due on the return of the first inquisition. The former, by means of which a simple contract debt could be turned into a debt of record, was always much more in the nature of an *ex parte* proceeding, and in such a case at any rate a jury could find that a debt was due to the Crown on the sole evidence of an affidavit (*R. v. Ryle*, 1841, 9 Mee. & W. 227, overruling the case of *R. v. Hornblower*, 1822, 11 Price, 29, which had been decided on the principle that all evidence given before a jury must be *viva voce* evidence (see note to this case)). By sec. 47 of 28 & 29 Vict. c. 104, it is, however, provided that an immediate extent may be issued on an affidavit of debt and danger, and on the *fiat* of the Chancellor of the Exchequer, or a justice of the High Court. In the event of the death of the Crown debtor the writ of *diem clausit extremum* (*q.v.*) is made use of instead of the ordinary writ of extent. It can be obtained in the same way as an immediate extent, except that instead of an affidavit of debt and danger an affidavit of debt and death will be required. *Mutatis mutandis*, the form of writ is the same in the case of extents in chief and of extents in aid. It begins with the customary greeting from Her Majesty to the sheriff, and recites the fact of the debt, and that the Queen is "willing" to be satisfied the same with all the speed she can, incidentally remarking that it is only just that this satisfaction should be given. In addition to the ordinary *capias* clause, which was originally only inserted in the case of the Crown and which is seldom put in force (*R. v. Plarr*, 1816, 3 Price, 94), it contains a direction to the sheriff to summon a jury and to diligently inquire what lands and tenements the Crown debtor had within his bailiwick on the day he first became indebted to the Crown, or at any time since, and also what goods and chattels, debts, specialties, and sums of money he or anyone in trust for him "now hath within the bailiwick, and to appraise and extend and take and seize into our hands the same until the debt is fully satisfied, and to make a return to the justices of the Queen's Bench Division of the High Court of Justice." There is a proviso at the end of the writ that the sheriff is not to sell, or cause to be sold, the goods and chattels seized until otherwise commanded by the Crown. On the receipt of the extent it is the duty of the sheriff to summon a jury of twelve men from the ordinary jury book, who are sworn "to well and truly inquire what lands and tenements, and of what yearly value the debtor has, and what goods and chattels, and of what sorts and values, and of what debts, credits, specialties, and sums of money the said debtor or any person or persons to his use or in trust for him now have, and that you appraise such goods and chattels . . ." The sheriff should also issue a summons to the defendant, and to all other persons who know anything about the defendant's property, to attend before the inquisition. Both the defendant and any claimant of property in the goods inquired into may cross-examine the witnesses for the Crown, or contest the case set up for the Crown, by themselves calling evidence, and in the event of such evidence being rejected, the Court will set aside the extent and inquisition (*R. v. Bickley*, 1817, 3 Price, 280; 18 R. R. 634). The procedure on a writ of extent is not varied by the Crown Suits Act or the rules made thereunder in 1860 and 1861 (St. R. & O., Rev., vol. ii. pp. 645, 683). Claims by third parties to the property taken can be made under rules 48 and 49 of 1860. Some discussion appears to have taken place in the case of *R. v. Sherwood*, (1816, 3 Price, 275) as to whether a set-off can be pleaded against the Crown; and though it was unnecessary to decide the point, in that case Baron Graham says he should hardly think that on an extent in aid the Crown can be in a better position than the Crown's debtor himself would have been. As soon as the verdict of the jury has been recorded

it is the duty of the sheriff to seize and take the property found into Her Majesty's hands, and in the case of lands or debts the finding of the jury is equivalent to seizure. We have now to consider what the sheriff is entitled to seize, and before going further it is important to notice that in the case of lands there is this difference between an extent in chief and an extent in aid. In the former case the lands of the Crown debtor are bound from the time when the debt first became a debt of record, but in the latter case the lands of the Crown debtor are bound only from the recording of the debt from the Crown debtor's debtor to the Crown debtor under the inquisition, unless the debt due to the Crown debtor be by judgment or recognisance. The sheriff may seize land in which the debtor has a legal estate. He may also seize the trust estates of the debtor (*Sir Edward Coke's* case, 1624, 1 Godb. 289), or a reversionary interest such as an equity of redemption (*R. v. Delamotte*, 1801, For. 162; 5 R. R. 714), but copyholds are not extendible by the Crown (*R. v. Lord Viscount Lisle*, 1758, Park. 195), and a leasehold interest such as a term of years may be extended as land under the extent or appraised in the same manner as any other chattel. In either case it is only bound from the *teste* of the extent (*Fleetwood's* case, 1611, 8 Co. Rep. 271). All the goods and chattels which the Crown debtor, or any other person in trust for him, has at the date of the *teste* of the extent, except the necessities of life for himself and his family, may be taken by the sheriff; and beasts of the plough are also exempt from seizure if other sufficient goods and chattels can be found. Query as to the effect of a sale in market overt after *teste* of an extent (West, p. 96). The sheriff is also to seize the money, debts, credits, and specialties of the Crown debtor. All *bona fide* assignments, or charges, created when the debtor has legal power and authority to create them are entitled to priority over the extent from the Crown. For examples of such dealings by the debtor see the judgment of Patteson, J., in *Giles v. Grover*, 1832, 9 Bing. at p. 139. Of course after execution executed, an extent from the Crown comes too late, but, as sale and not seizure under a writ of *fieri facias* is the execution of the writ, an extent tested after seizure but which reaches the sheriff before he has sold the goods seized entitles the Crown to priority of execution on the maxim *Quando jus domini Regis et subditi insimul concurrunt, jus Regis preferri debet*. The sheriff must make a return recording the findings of the jury on the various questions submitted to them, and stating that he either has carried out the instructions as to seizure contained in the writ, or has been unable to do so. Execution under a writ of extent is completed by delivery under a liberate, which is a writ commanding the sheriff to deliver to the debtor the lands, tenements, goods, chattels, etc., seized, to hold them according to the extent and appraisement. The sheriff is not entitled to sell the goods and chattels he has seized without the issue of a writ of *renditioni exponas* (as to which see *ante*, p. 134), which orders the sheriff to sell them for at least the price at which they were appraised. If he returns that he is unable to obtain that price, a writ *renditioni exponas pro optimo pretio* will be issued (see 25 Geo. III. c. 35, and 28 & 29 Vict. c. 104, s. 50, as to the sale of a Crown debtor's lands, and *R. v. Hopper*, 1816, 3 Price, 40; 18 R. R. 641).

[*Authorities.*—West on *Extent*; Mather, *Sheriff Law*; Price, *Exchequer Practice*; Statutory Rules and Orders, Revised; Note to *R. v. Hornblower*, 1822, 11 Price, 29.]

External Fence.—See LONDON (COUNTY), *Buildings*.

External Wall.—See LONDON (COUNTY), *Buildings*.

Exterritoriality; Extra-Territoriality.—The authority of a State within its own territory is absolute and exclusive. This admits, however, of a certain number of exceptions, comprehended in international law under the fiction of extra-territoriality, or now, more commonly, exterritoriality, a word which is neither exhaustive nor correct, but which in the absence of a better one has acquired in the currency of international law a pretty well-defined meaning.

The term has been stated to have been first used by Lord Stowell, who, in one of his judgments, spoke of an “extra-territorial community” formed by Europeans in Asiatic States. See, however, Grotius, who refers to diplomatic agents as *quasi extra-territorium* (*De Jur. B. ac P.* ii. c. 18, s. 5).

The persons and things in favour of whom and to which the fiction applies are—(1) the chiefs of States, who are assumed to represent their nation in the highest degree (see STATE; SOVEREIGNTY; INCOGNITO); (2) diplomatic agents and their *personnel*, who are officially received as representatives of their States (see DIPLOMATIC AGENTS; DOMICILE); (3) consuls in non-Christian countries, and sometimes to some extent in Christian countries (see CONSUL); (4) subjects or citizens of Christian States who are liable to the consular instead of the territorial jurisdiction in non-Christian countries (see CAPITULATIONS); (5) armies or regiments when by consent upon the soil of a foreign State; and (6) public ships in foreign waters. A case of a particular nature is that of the Pope, in virtue of the law of guaranties under which the papal palace and all the buildings inhabited by the persons forming his court are held to be exterritorial (see POPE).

The privilege is not unlimited. The right of entrance into foreign territory on which the privilege is founded is one dependent on a comity which circumstances may abridge. Thus for reasons of State a sovereign may have the permission refused to him to set foot on a foreign soil, and much more is the like true of ships and armies (Woolsey, p. 101).

Foreign Sovereign.—The position of a foreign sovereign was gone into pretty fully in *Mighell v. Sultan of Johore*, in which it was held that the Courts in this country have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction in the face of the Court. Therefore, if a foreign sovereign resides in England, and enters into a contract under an assumed name, he is not liable to be sued for a breach of the contract. A certificate from the Foreign or Colonial Office was deemed conclusive as to the status of such a sovereign (C. A. (affirm. Div. Ct.), [1894] 1 Q. B. 149). Wills, J., distinguishing this case from *The Duke of Brunswick v. King of Hanover* (1844, 6 Beav. 1; 2 H. L. 1), stated that—

The ground upon which the immunity of sovereign rulers from process in our Courts is recognised by our law, is that it would be absolutely inconsistent with the status of an independent sovereign that he should be subject to the process of a foreign tribunal. It has been attempted in some cases to say that the sovereign may lose his immunity and privileges by laying down his character as a sovereign and entering into trading transactions as a private person in another country. . . . We have been referred to certain dicta of authors of treatises on international law. One of those dicta suggests that if an independent sovereign ruler comes into this country incognito, he is amenable to the jurisdiction of our Courts, although he chooses to claim his immunity. That dictum has never been acted upon, and the suggestion has probably arisen from a loose way of looking at the case of *The Duke of Brunswick v. King of Hanover*. That was a very peculiar case, because the King of Hanover was not only a foreign sovereign, but also a British peer. He was sued in his character of a British peer, and it was alleged that the transactions in respect of which it was sought to make him amenable

to the jurisdiction of the Courts here, had nothing to do with his character of King of Hanover. It was said by the Court that inasmuch as he had two distinct capacities, one of which did not touch his character and attributes as a ruling sovereign, he might be sued in the Courts of this country in respect of transactions done by him in his capacity as a subject. But the Sultan of Johore is in no sense a British subject.

In the same case Lord Esher, M. R., quoting from a previous judgment (*The Parlement Belge*, 1880, 5 P. D. 197), said that the principle to be deduced from the cases was "that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction" (*The Parlement Belge*, 1880, 5 P. D. 197).

But this apparently does not apply to a counter-claim brought against a plaintiff State, judging by the dicta of the judges in *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*. In this case a fund arising from debentures issued by the defendant company and guaranteed by the South African Republic was by arrangement lodged with two trustees, one nominated by the Republic and the other by the company, pending the completion of a railway which the company was making under a concession by the Republic. The nominee of the company having died, the Republic brought an action in England, the fund being in this country, to have a new trustee appointed and the fund paid to the two trustees. The company put in a defence and counter-claim, setting forth that they had sustained heavy loss through an alleged libellous letter written in the name of the Republic. Lindley, L.J., said:

I treat this as an action by a foreign Government which submits to the jurisdiction of the Court as regards all matters properly appertaining to the action so brought. Amongst such matters are the questions which, according to our practice, can be properly raised under a counter-claim.

Lord Ludlow, L.J., acquiescing in the same view, assumed that a cross-action could be brought against the South African Republic, and looked upon the Republic as having, by appealing to English law, brought itself within the jurisdiction of our Courts, so as to be in the position of an ordinary litigant.

It was held, however, by the Court of Appeal that if the plaintiff had been an individual resident in this country, the counter-claim for libel would have been struck out, and the defendants left to bring a separate action, inasmuch as the claim for damages for libel could not be conveniently tried in an action for appointing a new trustee and protecting a trust fund, and that the fact that the company could not bring a separate action for libel against the Republic was not a sufficient ground for allowing the counter-claim for libel to go on (*South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487). In subsequent proceedings in the same case a counter-claim for damages in respect of alleged breaches of a contract relating to the construction of a railway in the plaintiffs' territory, under a term of which contract the plaintiffs sued, was struck out; and it was held that where a foreign State sues in this country, cross-proceedings can only be taken against it for discovery or

in mitigation of the relief which it claims (S. C., per North, J., 1897, W. N. 162).

Diplomatic Agents and their Suites.—See AMBASSADOR ; DIPLOMATIC AGENTS ; DOMICILE.

Consuls.—See CONSUL ; CAPITULATIONS.

British Subjects in non-Christian Countries.—The immunity of British subjects from the local jurisdiction in the countries with which there are treaties to this effect (see CAPITULATIONS) does not bring a counter-claim against a native subject within the extraterritorial (consular) jurisdiction. This was decided in *The Imperial Japanese Government v. Peninsular and Oriental Steam Navigation Co.* It was held that by virtue of treaties between Great Britain and Japan, the consular Courts of the former country and the territorial Courts of the latter country had exclusive jurisdiction over claims against British and Japanese subjects respectively, and that it would be in excess of the jurisdiction granted to the British consular Court if it were to entertain by way of counter-claim or cross-action a claim by a British defendant against a Japanese plaintiff. The cognisance of such claim belonged to the territorial Courts ([1895] App. Cas. 644).

Armies on Foreign Territory.

"The grant of passage," says Vattel, "includes that of every particular thing connected with the passage of troops, and of things without which it would not be practicable, such as the liberty of carrying whatever may be necessary to an army ; that of exercising military discipline on the officers and soldiers ; and that of buying at a reasonable rate anything an army may want, unless a fear of scarcity renders an exception necessary, when the army must carry with them their provisions" (iii. 8, s. 130).

As examples of military regiments on the territory of consenting States may be cited the case of the French troops in Spain in 1824, in Sardinia in 1839, at Rome at intervals between 1849 and 1870 ; Russian troops in Roumania in 1877 ; the occupation by the allies of French territory in 1815, and by the Germans after the peace of Frankfort ; and the Dutch garrison in certain Belgian towns in virtue of treaties of boundary (see Rivier, *Droit des gens*, i. 333).

British Public Ships in Foreign Waters.—A ship is not only part of the territory of a State, it is a floating fortress "representing the independence of its State" (Rivier, i. 334). In foreign waters, however, a merchant vessel is under the territorial jurisdiction, and is under any constraint imposed by the laws prevailing in such foreign waters. It is not so with public ships, which retain their independence wherever they may be. But the immunities of a public vessel "belong to her as a complete instrument made up of vessel and crew, and intended to be used for specific purposes. . . . If members of her crew go outside the ship or her tenders or boats, they are liable in every respect to the territorial jurisdiction. Even the captain is not considered to be individually exempt in respect of acts not done in his capacity of agent of his State. Possessing his ship in which he is not only protected, but in which he has entire freedom of movement, he lies under no necessity of exposing himself to the exercise of the jurisdiction of the country, and if he does so voluntarily he may fairly be expected to take the consequences of his act" (Hall, *Inter. Law*, p. 205).

Though the extraterritoriality of a ship does not extend to its officers and men while they are on shore, the territorial Government, nevertheless, often abandons cognisance and punishment of offences committed by a ship's company on shore, to the Government to which the ship belongs (Rivier, i. 335).

A statement of opinion in the Report of the Royal Commission on Fugitive Slaves (1876, p. xxiv.), by Sir R. Phillimore, Mr. M. Bernard, and Sir H. S. Maine, contains the following observations :—

It is true as a general proposition "that a naval officer entering with the ship under his command the waters of a friendly State, ought to respect the local laws, and to refrain from lending his assistance to any violation of them. It is right that he should receive instructions to this effect, and such instructions British officers now receive. They are directed by the Queen's regulations to 'cause all those under their orders to show due deference to the established rights, ceremonies, customs, and regulations' of the place they have occasion to visit; and they are prohibited in general from receiving on board whilst lying in the ports of a foreign country, persons who may seek refuge for the purpose of evading the local laws to which such persons may have become amenable.

"The foregoing proposition, however, is only a general expression of what, in given circumstances, one maritime State may fairly and reasonably expect at the hands of another; and it would be an error to regard it as a canon of international law absolute, inflexible, and admitting of no qualification. Where the execution of the local law would be plainly repugnant to humanity or justice, the sovereign with whose commission the ship sails cannot reasonably be held bound to instruct his officers to enforce the law or permit it to be enforced on board of her. He may rightly instruct them not to enforce it there, and not to permit it to be enforced."

In virtue of a usage confirmed by divers treaties (e.g. between Great Britain and Belgium, February 6, 1876, Art. 6; between France and Italy, March 3, 1869; and between Great Britain and France, August 30, 1890, Art. 9), the privilege of exterritoriality is extended from warships to other public ships, notably to packet steamers as such. Thus in the *Parlement Belge* case (1880, 5 P. D. 197) it was held, reversing the decision of the Admiralty Division, that an unarmed packet belonging to the sovereign of a foreign State and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit *in rem* to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire (1880, 5 P. D. 197; cf. *The Exchange v. M'Faddon*, 1812, 7 Cranch, 116).

A consequence of the exterritoriality of public ships appears to be that if a man commits a crime on foreign territory and takes refuge thereafter in one of his country's public ships, he escapes extradition, if, as is the case with all nations except England and the United States, his country refuses to give up its own subjects (Rivier, i. 332; see further, *BRITISH SHIP*, vol. ii. at p. 256).

[Authorities.—Hall, *International Law*, Oxford, 1895; Rivier, *Principes du Droit des gens*, Paris, 1896; Lawrence, *International Law*, London, 1895; Von Strisower, *Exterritorialität*, Vienna, 1894; Lorimer, *Institutes of the Law of Nations*, London, 1884; Calvo, *Droit International*, Paris, 1887; Woolsey, *International Law*, London, 1879; Twiss, *Law of Nations in Time of Peace*, Oxford, 1884; Vattel, *The Law of Nations*, London, 1797; Lehr, *Manuel des Agents Diplomatiques Français et Étrangers*, Paris, 1888; Perels, *Rechtsstellung der Kriegsschiffe in fremden Hoheitsgewässern*, Freiburg, 1886, and *Droit Maritime*, Paris, 1884; Pitt-Cobbett, *Leading Cases and Opinions in International Law*, London, 1892; Holtzendorff, *Handbuch des Völkerrechts*, Hamburg, 1887; Report of Royal Commission on Fugitive Slaves, 1876 [c. — 1516 — 1a]; Odier, *Des Privilèges et Immunités des Agents Diplomatiques en Pays de Chrétienté*, Paris, 1890.]

Extortion (*Ectorsio*) in its widest sense means any oppression of the lieges under pretence or colour of right. See EXACTION; OPPRESSION.

In a popular sense it is used as equivalent to blackmailing or obtaining money by threats. See *MENACES*. But its ordinary and proper legal meaning is the taking of money or any valuable thing by any public officer by colour of his office, and otherwise than in good faith on a mistake as to the law, where none or less is due, or before it is due (*Beaufage's case*, 1613, 10 Co. Rep. 102 a; Steph. *Dig. Cr. Law*, 5th ed., p. 88). It is said by Coke, *l.c.*, to be the *crimen expilationis* and *crimen concussionis*. It is not, of course, an offence to claim and receive the stated and known fees receivable by the officer whether they are customary or statutory (2 *Co. Inst.* 210; *Maule v. White*, 1896, 60 J. P. 567), and the offence is not constituted by demand without receipt.

The offence is treated as a common law misdemeanour punishable on indictment or information by fine and imprisonment and removal from office. The earliest statute (1275, 3 Edw. I. c. 26) is treated as merely declaratory of the common law, so far as the king's officers are concerned. This Act alone remains of the statutes prior to this reign directed against extortion. The old decisions are somewhat perplexing as to whether the accusation was made at common law or against a statute.

The following officers have been held liable to indictment for extortion: judges and Courts (*Smith v. Mall*, 1622, 2 Roll. Rep. 263), justices of the peace and their clerks, and clerks of the peace (*Anon.*, 1700, 12 Mod. Rep. 512; Dalton, *Country Justice*, p. 82), sheriffs, under-sheriffs, and their bailiffs (*Randal v. Keite*, 1665, 1 Keb. 873; *Nelme's case*, 1663, 1 Keb. 623; *Hescot's case*, 1693, 1 Salk. 330; *R. v. Beechcroft*, 1698, 12 Mod. 255), bailiffs of Courts, hundreds, and franchises (*R. v. Cover*, 1662, Sid. 91), receivers of taxes (*R. v. Atkinson*, 1706, 1 Salk. 382), and gaolers (*Lady Broughton's case*, 1673, Raym. (Sir. T.) 216). It is to be inferred from the precedents preserved that a constable could be prosecuted for extortion (*Arch. Cr. Pl.*, 21st ed.). A landlord's bailiff or broker has been described as a public officer (see *Hills v. Street*, 1828, 5 Bing. 37, 41). His appointment is now regulated by statute (see Foà, *Landlord and Tenant*, 2nd ed., p. 414). Judges and officers of ecclesiastical Courts have been held liable for extortion (*R. v. Loggen*, 1716, 1 Stra. 73), but this seems to have been under the repealed Act, 25 Edw. III. st. 6, c. 9 (*Lake's case*, 1590, 3 Leon. 268). There are also precedents of proceedings against churchwardens (*R. v. Ayres*, 1666, 2 Keb. 100), millers, ferrymen, and turnpike-keepers for demanding excessive tolls. But it is difficult to see how they can be regarded as public officers, or other than bailiffs of persons possessed of a franchise by grant or statute (*R. v. Roberts*, 1691, Carth. 226). So far as concerns the sheriff and his subordinates, the penalties for extortion in prior statutes are now superseded by sec. 29 of the Sheriffs Act, 1887, which also renders punishable, as for contempt, persons who obtain fees under colour of acting as or for the sheriff. See *SHERIFF*. It is also superseded as to coroners by sec. 8 of the Coroners Act, 1887 (50 & 51 Vict. c. 71), which empowers the Court before which a coroner is convicted of extortion to remove him from his office (and see ss. 17, 35).

There are special statutory provisions as to the trial in England of Indian officials guilty of extortion and kindred offences (see *R. v. Douglas*, 1849, 13 Q. B. 42).

A clerk of the peace, if guilty of extortion, can be removed from office by order of Quarter Sessions on articles in writing exhibited under 1 Will. & Mary, c. 21, s. 5 (*R. v. Baynes*, 1706, 2 Salk. 680; *R. v. Cumberland Justices*, 1706, 11 Mod. 80).

Where the thing obtained is a bond or obligation or a promise not warranted by law, it is void (*Beaufage's case*, 1613, 10 Co. Rep. 99 b). The

payment of the sum extorted is no bar to criminal proceedings by the victim.

An indictment for extortion has always been triable at Quarter Sessions (*R. v. Loggen*, 1716, 1 Stra. 73 at 75; 3 *Co. Inst.* 149; 4 *Com. Dig.* tit. "Justice B." 35; 5 & 6 Vict. c. 38, s. 1). The offence in no way differs from other common law misdemeanours, as to the liability of aiders, abettors, counsellors, procurers, and joint-offenders.

An indictment for extortion must contain the words "extorsively and in colour of office" (*extorsive et colore officii*), and should not include many distinct acts of extortion (*R. v. Baynes*, 1706, 2 Salk. 680; *R. v. Roberts*, 1691, Carth. 226; Show. 189; *R. v. Cumberland Justices*, 1706, 11 Mod. 80, 82). It must specify a certain sum as extorted (*R. v. Burdett*, 1 Raym. (1d.) 149; *R. v. Gilham*, 1795, 6 T. R. 265); and where the extortion is of more than the legal sum, the sum legally payable must be specified (*Lake's case*, 1590, 3 Leon. 268).

Civil Proceedings.—The person from whom money has been extorted by an officer of the king has, under 3 Edw. I. c. 26, a remedy by action for double value, except in the case of sheriffs, where his remedy is under sec. 29 of the Sheriffs Act, 1887, by action of debt for the forfeiture of £200 then imposed and for damages sustained. There is not now any special venue for such proceedings. Independently of statutes a person from whom money has been extorted, whether by an officer of the Crown or not, under colour of office, can recover it by action for money had and received to his use (*Morgan v. Palmer*, 1824, 2 Barn. & Cress. 729; *Steele v. Williams*, 1853, 8 Ex. Rep. 625; *Truherne* *supra* 1856, 5 El. & Bl. 913; *Hills v. Street*, 1828, 5 Bing. 37; *Lyon v. Tomkins*, 1836, 1 Mee. & W. 603).

[*Authorities.*—3 *Co. Lit.* 368; 1 *Co. Inst.* 368; 3 ditto 149; Vin. Abr. tit. "Extortion"; Bac. Abr. tit. "Extortion"; 1 Russ. on Crimes, 6th ed. 423; Hawk., P. C. bk. i. c. 68; 4 Black. Com. 141; Burn, *Justice*, 30th ed., tit. "Extortion."]

Extradition.

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Extradition (from Latin *ex* and *traditio*, a delivering up) is the delivery by one State to another of fugitives from justice.

Principles on which founded.—"The extradition of fugitive criminals," says the Report of the Royal Commission on Extradition of 1878 (Parl. Paper, 1878 [C. 2039]), is founded on a twofold motive:—

(1) That it is the common interest of mankind that offences against person and property, offences which militate against the general well-being of society, should be repressed by punishment, as the means of deterring others from committing, as well as of deterring the criminal himself from repeating, the offence, as also of disabling the offender, either permanently or temporarily from further crime; and (2) that it is to the interest of the State into whose territory the criminal has come that he shall not remain at large therein, inasmuch as from his past conduct it may reasonably be

anticipated that if opportunity offers he will again be guilty of crime. No State can desire that its territory should become a place of refuge for the malefactors of other countries. It is obviously its interest to get rid of them.

These are motives for the punishment of offenders rather than strictly for their extradition. Beccaria, in his famous *Traité des délits et des peines* (French translation: Lausanne, 1766), states the grounds upon which extradition rests with more precision:—

He who raises his hand against man, deserves having all men as his enemies, and must always be an object of universal execration. It must be remembered, however, that judges are not the avengers of humanity in general, but act in virtue of conventions, binding man with man. The place of punishment can only be that in which the crime is committed, because it is there only, and nowhere else, that men should do harm to an individual to prevent harm being done to the public at large. A villain who has broken no conventions of a particular society, of which for argument he is not a member, may well be feared and expelled by that society, but not punished by their laws, which are made only to maintain social order, and not to punish the intrinsic malice of the action itself. But is it useful that nations should reciprocally give up criminals? I believe that the notion of not being able to find a place upon earth where a criminal will not be punished, would be an effective means of prevention. I cannot, however, approve the usage of our surrendering criminals until laws, being brought more into conformity with the needs of humanity, punishments rendered less vigorous, arbitrary power, as well as the power of opinion, more weakened, give a perfect surety against the effect of personal hatred. . . .

Extradition, in other words, has followed from the necessary territoriality of criminal procedure (see EXTRATERRITORIAL CRIME). It is based on the assumption that all mankind have a common interest in the punishment of acts universally considered as crimes. On the other hand, just as the interest of mankind justifies extradition, the same interest justifies States in regulating extradition by Treaties, and not exposing the extradited criminal to vindictive proceedings or charges, which are not common ground among civilised communities.

History of Extradition.—There were Treaties of Extradition in antiquity, but their object seems almost invariably to have been political, that is, the service done to an existing Government by the surrender of political fugitives, conspirators, or rebels.

This also characterises several conventions of the seventeenth and eighteenth centuries, and even in the present century the Convention of Berlin in 1833, for the extradition of political criminals between Russia, Austria, and Prussia (Rivier, *Droit des gens*, i. 349).

"Treaties of extradition in their earliest form, however," observes Twiss, "appear to have contained stipulations for the surrender of fugitive slaves, and compacts with that object in view were not unusual amongst the nations of Greece. It would appear to have been the practice amongst those nations to afford sanctuary to fugitive slaves, unless there was an international compact to the contrary, or a provision to that effect embodied in some treaty of commerce" (*Peace*, p. 409).

Dionysius tells us that if any State friendly to Rome had reason to complain of the conduct of a Roman citizen, it had a right of setting the case before the Fecial College, and if the Feciales were satisfied as to the justice of the charge, they had power to hand over the guilty party to the offended State (Halicarn. l. ii. 72, cited by Hosack, *History of the Law of Nations*, p. 17).

The Roman law also allowed the surrender of citizens who offered violence to foreign ambassadors on Roman territory. Under this law two Romans were surrendered to the Apolloniatae in 266 B.C., and again two others to the Carthaginians in 188 B.C. (cited from *Digest*, 50, 5, 17; Rein, *Criminalrecht der Römer*, pp. 175, 176; by Clarke, *Extradition*, 3rd ed., p. 18).

Treaties are frequent in the Middle Ages, by which it is stipulated that nations shall mutually give up to each other's power the criminals who may have sought refuge with them from the justice of their own country (Ward, *History*, ii. p. 319).

Thus treaties concluded with the Greeks by Oleg in 911, and by Igor in 944, stipulated that Russians having committed crimes in Byzantium were to be delivered over to their country to be tried, and *vice versa*. Analogous dispositions are met with in the treaty concluded by Novgorod with the Germans, at the end of the twelfth century (F. de Martens, *Droit International*, iii. p. 356).

By a treaty between William, King of Scotland, and Henry II. of England, in 1174, it was agreed that if persons guilty of felony shall have fled from England to Scotland, they shall be immediately seized, and either be tried in the King of Scotland's Courts or delivered up to the justices of England, and *vice versa*. By the Treaty of Paris, May 1303, Philip IV. and Edward I. refuse to grant protection to each other's outlaws, and by another between Charles V. of France and the Duke of Savoy in 1378, all malefactors who had fled for refuge from Savoy to Dauphiny, or from Dauphiny to Savoy, were to be rendered up to justice, *even* though they should be the subjects of the State delivering them (Ward, *History*, ii. pp. 319, 320; Bacon's *Essays and Historical Works*, Bohn's ed., 1852, p. 466).

These early treaties of extradition after the fall of the Roman Empire, to which may be added another between England and Scotland (1308), were between continuous States, apparently for their common protection from Border raids, and we soon find States tempering their discretion with humane considerations, as when, in 1506, Philip, King of Castile, father of the Emperor Charles V., refused to surrender the Earl of Suffolk, nephew of Edward IV., who had taken refuge in Philip's dominions, to Henry VII., except upon his undertaking on his honour not to take his life; when James IV. of Scotland refused to give up Perkin Warbeck, France to deliver up Cardinal Pole to Henry VIII., and Henry III. of France, in 1584, to give up certain Englishmen who were said to be plotting in France against England; and when, in 1588, Farnhurst, having been demanded by Elizabeth from James VI. of Scotland, on the charge of having been instrumental in the murder of Sir John Russell, the eldest son of the Earl of Bedford, the Scottish king refused to deliver him up except upon conviction by a fair trial, but he caused him "to enter into ward" in the town of Aberdeen (Sir W. Scott, *History of Scotland*, ii. 33, quoted by Clarke, *Extradition*, 3rd ed., p. 23).

Grotius sums up the practice at the time of composing his work (Barbeyrac, 1623-1625) as follows:—

"The right which sovereign Powers have to demand criminals who have escaped from their territories is limited according to the usage established in the greater part of Europe for some centuries, to political crimes or to those which are of extreme enormity. For other and less considerable crimes, both sides shut their eyes, at all events, unless otherwise arranged by treaties between States." *De jure belli ac pacis*, l. ii. c. 21). This partly bears out Sir E. Clarke's observation (*Extradition: ubi supra*) that—

"In the early cases found in modern history it was always for political offences that the surrender was claimed; indeed, at a time when the transactions of life were comparatively simple, crime was so easily detected, and the criminal had so few means of escape that there was no necessity for those provisions which the complicated civilisation of the world now renders necessary."

Towards the close of the seventeenth century a case arose involving the extradition by a State of one of its own subjects.

A treaty had been made in 1662 between England and the States-General of Holland by which they agreed to give up any persons, excepted from the English Act of Indemnity, and all other persons demanded by the English Government. Under it a demand was made in 1687 by James II. for the extradition of Burnet, who was then acting as private secretary to the Prince of Orange in Holland, and who, for various violent writings against the king, had recently been cited before a Scottish Court, and, not appearing, had been outlawed. The English ambassador demanded his banishment.

"It was pretended," says Burnet, in his *History of My Own Time*, "to be high treason to say that my allegiance was now transferred . . . which struck at a great point which was a part of the law of nations. Every man that was naturalised took an oath of allegiance to the prince or State that naturalised him. And since no man can serve two masters, or be under a double allegiance, it is certain that there must be a transfer of allegiance, at least during the stay in the country where one is naturalised. . . . I being outlawed, it was demanded that in pursuance of an article of the treaty that related to rebels or fugitives I might be banished the provinces. I was called before the deputies of the States of Holland . . . and I claimed their protection. So, if I was charged with anything that was not according to law, I submitted myself to their justice. I should decline no trial nor the utmost severity if I had offended in anything. As for the two memorials that claimed me as a fugitive and a rebel, I could not be looked upon as a fugitive from Scotland. It was now fourteen years since I had left that kingdom, and three since I came out of England with the king's leave. I had lived a year in the Hague openly, and nothing was laid to my charge. As for the sentence that was pretended to be passed against me, I could say nothing to it till I saw a copy of it. The States were fully satisfied with my answers, and ordered a memorial to be drawn according to them. They also ordered their ambassador to represent to the king that he himself knew how sacred a thing naturalisation was. The faith and honour of every State was concerned in it. If the king had anything to lay to my charge justice should be done in their Courts. The king took the matter very ill, and said it was an affront offered him and a just cause of war. . . . He ordered a third memorial to be put in against me in which the article of the treaty was set forth; but no notice was taken of the answers made to that by the States; but it was insisted on that since the States were not bound to give sanctuary to fugitives and rebels, they ought not to examine the grounds on which such judgments were given, but were bound to execute the treaty. Upon this it was observed that the words in treaties ought to be explained according to their common acceptation, or the sense given to them in the civil law, and not according to any particular forms of Courts, where for non-appearance a writ of outlawry or rebellion might lie."

(Ed. 1839, pp. 461, 462.)

The first modern treaty of extradition proper seems to have been that concluded in 1706 between Venice and the Cantons of Zürich and Berne for the surrender of "murderers, sodomites, thieves, incendiaries, violaters of girls, robbers, and false coiners" (Schmauss, *Corp. juris gentium academicum*, ii. s. 1184); and Professor Lammasch also cites another shortly afterwards concluded in 1715 between France, the Catholic Cantons of Switzerland, and the Republic of Valais providing for the surrender of persons guilty of "crimes against the State, murder and disturbance of the common peace" (see *Auslieferungspflicht und Asylrecht*, p. 23).

These treaties were followed by others, relating to specified offences, either as independent treaties or as articles of treaties dealing also with other matters, between Denmark and Sweden in 1721, Hamburg and Holstein in 1736, Sweden and Denmark in 1738, Russia and Sweden in 1743, Austria and Graubünden in 1752 and 1763, France and Württemberg in 1763, France and Spain in 1765, France and the Swiss Confederation in 1777 ("political criminals, assassins, and other persons having committed ordinary crimes"), Austria and Sardinia in 1792. This brings us down to

the treaty between Great Britain and the United States of America of 1794, usually described as Jay's Treaty, in which an article relating to extradition was inserted, which we believe is the first attempt to regulate the procedure of extradition, for neither during the Middle Ages nor later until this treaty have we found any trace of regulations for the extradition of criminals.

The article in question (the 27th) is as follows:—

It is further agreed that His Majesty and the United States on mutual requisitions by them respectively, or by their respective ministers or officers authorised to make the same, will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive (*Public Statutes at Large of the United States*, ed. Richard Peters, viii. 129).

This treaty became, on ratification by the Senate of the United States, part of the supreme federal law; but as to British dominions it depended for its municipal validity on the Act 37 Geo. III. c. 97, s. 26.

This was succeeded by an agreement between Great Britain and France, inserted as Art. 20 in the Treaty of Amiens (March 27, 1802), in which it was again stipulated that "evidence of the crime" should be "properly established." The article runs as follows:—

It is agreed that the contracting parties upon requisitions made by them respectively, or by their ministers and officers duly authorised for the same, shall deliver to justice persons accused of the crimes of murder, falsification, or fraudulent bankruptcy committed within the jurisdiction of the requiring party, provided that delivery only take place when the evidence of the crime is properly established, when the laws of the place where the person has been discovered authorise his detention and his transportation to the place where the crime has been committed for the purpose of trial. The cost of the arrest and transport shall fall upon those who make the requisition; this article, however, not applying to any of the said crimes committed before the definitive conclusion of this treaty.

There was, as yet, no specific exclusion of political offences.

In England no question of the surrender of political offenders arose under either of these treaties, of which the latter lasted for a very short time, and the former only till 1812, and there is no recorded instance of the surrender of a political offender under the treaties. But before either had been made, it was well established as law or practice that no fugitive criminal from abroad could be surrendered. The rule protected political offenders, but rested on considerations absolutely independent of politics (see 42 *Edinburgh Review*, 130; *Jefferson's Works*, ed. Washington, p. 299; Clarke on *Extradition*, 3rd ed., 33; and *In re Adam*, 1837, 1 Moo. P. C. 460, 477). The English lawyers by the eighteenth century had come to the conclusion that the laws of England did not permit the arrest or surrender of fugitive offenders from foreign States. This is distinctly expressed by opinions of attorneys-general in 1763 (Cal. Stat. Pap., ed. Redington, No. 803, p. 264) and in 1769 (Cal. Stat. Pap., ed. Redington, No. 1177, p. 466); and from the case of *Count St. Germain*, 1776, 20 St. Tri. 1316, this view seems to have been accepted by the executive. Similar views have been expressed during this century by attorneys-general, *eg.* in 1836, when the Government was advised that it would be illegal to surrender to Spain even the worst of a shipload of convicts wrecked on the Bahamas (Forayth, *Case Const. Law*); and a similar opinion was given in 1854 as to the seizure of

deserters from a Russian public vessel (Forsyth, 468). The dicta in *Mure v. Kaye*, 1811, 4 Taun. 34, have never been accepted as a safe guide, either to the Crown or the magistrate (Clarke on *Extradition*, 3rd ed., 26). There are dicta of Blackstone (1 Com. 366) and Chitty (*Pleas of Crown*, ed. 1820, p. 49) to the effect that the Crown, by its prerogative, can expel even alien friends; but there does not seem to have been any attempt since the Revolution to exercise such prerogative, and the extrusion of alien friends has since then always been effected by statutory authority; and while in other States treaties and Acts have been regarded as merely regulating, internationally and municipally, the cases in which, and the conditions on which, offenders will be surrendered, the constitutional law of England admits indeed the treaty-making power of the Crown, but denies the treaty any extra-territorial validity without parliamentary sanction (*Walker v. Baird*, [1892] App. Cas. 451), and does not permit the Crown, under any prerogative claim, to surrender fugitives in any case not warranted by statute.

So far as any matter can be established without direct judicial decision, this was settled in the *Creole* case in 1841, when slaves on an American ship seized the ship and carried her into the Bahamas. Surrender of the slaves was demanded, on the ground that they had committed murder and piracy. Every lawyer in Parliament agreed that their surrender would be illegal (64 Hansard, Parl. Deb. 27-30, 317); and when the Ashburton Treaty was passed in 1843, it was judged necessary to give it municipal validity by statute (6 & 7 Vict. c. 76); and see Sched. 3 to the Extradition Act, 1870, and *U.S. v. Rauscher*, 1886, 119 U.S. 407.

M. Pradier-Fodéré describes the position of extradition at the end of the last century in his country, which was the most advanced in the conclusion of treaties:

At the end of the eighteenth century, France had regular relations with all neighbouring countries except Great Britain, with regard to extradition. Exact reciprocity was the rule; it was demanded by diplomatic means; *nationaux* were not to be surrendered; no exceptions were made in cases of political offences, and desertion and smuggling were among the list of offences for which it might be demanded (*Droit Intern. Public*, vol. iii. ss. 1880 *et seq.*).

In fact, it was only with the progress of the new liberalism dating from the early thirties of the present century, that the practice of refusing to extradite political offenders began to grow.

England, according to Professor F. de Martens, was the first country to declare that she would no longer yield political offenders (*Droit International*, i. p. 86). This was rapidly fanned into a principle by events in different countries of Europe, which made England a home for political refugees, whose only crime was more or less agitation for the adoption of institutions modelled on the example of England. Even in the Convention of 1843 with France no exception was made of persons charged with political offences.

This and disinclination on the part of the executive generally to act without all the judicial guarantees held to be requisite for the condemnation of an accused person rendered extradition, in the absence of a legislative enactment, practically a dead letter. Thus, under the treaty of 1843 with France, though the latter country in the succeeding nine years demanded the surrender of fourteen fugitives, only one was extradited.

At length a revised treaty between Great Britain and France containing articles excluding political offenders from its operation, and, excepting native subjects or citizens of the party to whom the requisition might be made, was signed in London in 1852. It was provided by Art. 15 that the

Convention should come into operation when an Act of Parliament had been passed to enable Her Majesty to carry its provisions into execution; but the British Parliament declined to give the executive government the necessary powers to execute its provisions, and thus the revised treaty still remained a dead letter.

In 1864-65, the French ambassador addressed communications to Earl Russell on the failure of French demands for extradition, surrender having been obtained in only one case during the twenty-two years that the Convention had been in operation. He gave the six months' notice of the termination of the Convention provided for in it, on the grounds that the English Government declined to surrender persons who had been convicted; and that the requirement of the production before a magistrate of *prima facie* evidence of the guilt of the person accused was an insuperable obstacle to the execution of the Convention in England, and differed from the general practice of the other European Powers. Earl Cowley replied that Her Majesty's Government regretted that the Convention had produced so little result, but the system could not be altered without having recourse to Parliament, and recent experience had shown that there would be great difficulty in obtaining from Parliament any further modification in regard to the requirements of law and the usage of Great Britain in dealing with persons accused of crime. The Legislature had made a concession in consenting to allow copies of depositions to be received in lieu of *parol* evidence. And there did not appear to be any insuperable difficulty in the production of evidence of this nature before the English magistrate. This, with evidence of identity, was all that was required for the commitment of a fugitive. Her Majesty's Government, however, seeing how serious would be the evil of an abrogation of the Convention, were prepared to consider any suggestions as to the means of making it more effective.

In 1868 a commission was appointed to inquire into the state of treaty relations as to extradition, with a view to substituting for the policy of validating each treaty by a separate statute a more permanent and uniform policy.

Extradition Treaties are at present in force with the following foreign States:—

FOREIGN STATE.	DATE OF TREATY	DATE OF ORDER IN COUNCIL APPLYING ACTS TO TREATY.
Argentine Republic	May 22, 1889.	Jan. 29, 1894.
Austria-Hungary	Dec. 3, 1873.	Mar. 17, 1874.
Belgium	May 20, 1876.	July 21, 1876.
	July 23, 1877.	Aug. 13, 1877.
	Apr. 28, 1887.	May 13, 1887.
	Aug. 27, 1896.	Nov. 27, 1896.
Brazil	Nov. 13, 1872.	Nov. 20, 1873.
Colombia	Oct. 27, 1868.	Nov. 28, 1869.
Denmark	Mar. 31, 1873.	June 26, 1873.
Ecuador	Sept. 20, 1880.	June 26, 1886.
France	Aug. 14, 1876.	May 16, 1878.
	Feb. 13, 1896.	Feb. 22, 1896.
Germany	May 14, 1872.	June 25, 1872.
" (Foreign Possessions)	May 5, 1894.	Feb. 2, 1895.
Guatemala	July 4, 1885.	Nov. 26, 1886.
Hayti	Dec. 7, 1874.	Feb. 5, 1876.
Italy	(Feb. 5, 1873.) (May 7, 1873.)	Mar. 24, 1873.
Liberia	Dec. 16, 1892.	Mar. 10, 1894.
Luxemburg	Nov. 24, 1860.	Mar. 2, 1881.
Mexico	Sept. 7, 1886.	Apr. 6, 1886.

FOREIGN STATE.	DATE OF TREATY.	DATE OF ORDER IN COUNCIL APPLYING ACTS TO TREATY.
Monaco	Dec. 17, 1891.	May 9, 1892.
Netherlands	June 19, 1874.	Aug. 6, 1874.
Orange Free State	June 20, 28, 1890.	Mar. 20, 1891.
[By a Cape Act, No. 22 of 1882, extradition of offenders from the Orange Free State and the Transvaal is regulated independently of treaty (see 30 L. J. 43, 124).]		
Portugal	{Oct. 17, 1892.}	Mar. 3, 1894.
	{Nov. 30, 1892.}	
[Prior to the making of this treaty, Portugal had in one case surrendered a fugitive without treaty (<i>Sinclair v. Lord Advocate</i> , 1890, 17 <i>Rettie, Justiciary Cases</i> , 38.)]		
Roumania	{May 31, 1893.}	Apr. 30, 1894.
	{Mar. 13, 1894.}	
Russia	Nov. 24, 1886.	Mar. 7, 1887.
Salvador	June 23, 1881.	Dec. 16, 1882.
Spain	{June 4, 1878.}	Nov. 27, 1878.
	{Feb. 19, 1889.}	May 28, 1889.
Sweden and Norway. . .	June 26, 1873.	Sept. 30, 1873.
Switzerland	Nov. 26, 1880.	May 18, 1881.
Tonga	Nov. 29, 1879.	Nov. 30, 1882.
Tunis	Dec. 31, 1889.	May 1, 1890.
United States	July 12, 1889.	Mar. 21, 1890.
Uruguay	{Mar. 26, 1884.}	Mar. 5, 1885.
	{Mar. 20, 1891.}	Nov. 24, 1892.

There is no provision in the Extradition Act preventing the Crown from concluding a treaty which is to have a retroactive effect, *i.e.* which is to apply to offences committed before it is made, or before the Acts are applied to it by Order in Council. In the case of Jabez Balfour his surrender was granted, although his offence was prior to the completion of the treaty (*Clunet*, 1895, 289, 300, 321). In the treaty with the United States, retroactive effect is expressly excluded in deference to the federal constitution, and it is necessary in each case to prove that the offence is subsequent to the ratification of the treaty (*In re Ashforth*, 1892, 8 T. L. R. 283).

A bill was passed in 1870, known as the Extradition Act, 1870 (33 & 34 Vict. c. 52), see *infra*, p. 271; and the statutes by which extradition is regulated are: The Extradition Act, 1870 (33 & 34 Vict. c. 52); the Extradition Act, 1873 (36 & 37 Vict. c. 60); and the Extradition Act, 1895 (58 & 59 Vict. c. 33).

Sec. 2 of the last of these states that it "may be cited as the Extradition Act, 1895, and shall be construed together with Extradition Acts, 1870 and 1873; and those Acts and this Act may be cited collectively as the Extradition Acts, 1870 to 1895."

In accordance with the Act of 1870 Orders in Council are made applying the Acts to the treaties (*supra*; and *London Gazette*, 1883).

The Orders in Council set out the text of the treaties. Those made prior to 1890 and still in force are collected in Statutory Rules and Orders, Revised, vol. iii.; and see *supra*. Those since made are printed in Statutory Rules and Orders for the year in which they are made, and are also gazetted.

Procedure of Putting an Extradition Treaty in force.—Where an arrangement has been made with any foreign State for the surrender of fugitive criminals, it is made operative (as above mentioned) by an Order in Council directing that the Extradition Acts shall apply in the case of such foreign State. The Order recites the terms of the arrangement, and only remains in force for the duration thereof. The Order is conclusive evidence that the arrangement therein recited is in accordance with the

Acts, and that they apply to the foreign State mentioned in the Order, and the treaty is read as incorporated with the Acts (*R. v. Wilson*, 1877, 3 Q. B. D. 42).

Extraditable Offences.—The offences which, under the Acts of 1870 and 1873, are extraditable, are the following (see Schedules to the Acts):—

Murder, and attempt and conspiracy to murder; manslaughter.

Counterfeiting and altering money, and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee or director, or member or public officer of any company made criminal by any Act for the time being in force.

Rape; abduction; child-stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by the law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

Kidnapping and false imprisonment.

Perjury, and subornation of perjury, whether under common or under statute law.

Indictable offences under the Larceny Acts, 1861 (24 & 25 Vict. cc. 97–100), or any Act or Acts amending or being substituted for the same; and any indictable offence under the bankruptcy laws not covered by the first schedule of the Act of 1870.

Sec. 3 of the Act of 1873 provides also that accessories, both before and after the fact, are liable to be apprehended and surrendered.

Not all these offences are necessarily included in every treaty, and regard must be had in the case of each treaty to the particular enumeration of offences in the list of crimes specified.

On the meaning of the word *faux* (*q.v.*) in the French version of the Anglo-French treaty, *Arton's case* involved a point which was considered by the Queen's Bench Division. His extradition was demanded by the French Government, *inter alia*, on the ground that he had been guilty of falsification of accounts as a director or secretary of a company. Falsification of such accounts is, and at the time when the Anglo-French Extradition Treaty was signed and ratified, namely in 1873 and 1876, was an offence by English law in virtue of the provisions of the Larceny Act, 1861. Under certain circumstances it may amount to forgery. But Sir John Bridge, negatived by implication the proposition that it did so in *Arton's case*. He committed *Arton*, however, for extradition under the term *faux* in the French version of the Extradition Treaty. It was contended, on proceedings on *habeas corpus* to review his decision, that *faux* meant "forgery," and did not include falsification of accounts. The Crown appeared to be reluctant to admit that *faux* was the equivalent of forgery. But the

Queen's Bench Division held it to be proved as a fact that falsification of accounts by a director or secretary of a company is in the eye of French law *faux* of a limited character under Article 147 of the *Code Pénal* as to *Faux en une écriture de commerce*. Arton, then, was guilty of an extradition crime, though not of forgery, and of *faux en une écriture de commerce* by French law. This difference between the character of the two offences was held by the Court to be no bar to his extradition, and his surrender accordingly took place, the offence being for *faux en une écriture de commerce*, ([1896] 1 Q. B. 509).

It is laid down in sec. 19 of the Act of 1870, the only reference in the Extradition Acts to persons extradited from a foreign country to, and at the instance of, Great Britain, that where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign State, such person shall not, until he has been restored, or had an opportunity of returning to such foreign State, be liable or tried for any offence committed, prior to the surrender, in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

It has been decided upon this section that an attachment issued by the High Court of Justice for disobedience to an order of the Court in a civil action is not an offence within the meaning of the 19th section of the Extradition Act, 1870. But where a party to an action in the Chancery Division was arrested in Paris for a crime under the Extradition Acts, and, while in prison in England under the warrant, was served with an attachment for disobedience to an order in the action, it was held that the attachment was valid, and that the prisoner was not entitled to his discharge until he had cleared his contempt, although he had been acquitted of the criminal charge. The judges stated, however, that if a warrant had been obtained not for the *bond fide* purpose of trying a person for a crime, but with the indirect object of bringing him within the jurisdiction, so as to make him amenable to an attachment in a civil action, it would have been an abuse of the process of the Court, and the attachment would have been set aside (*Pooley v. Whetham*, 1881, 15 Ch. D. 435).

On the other hand, in the Arton case, which was one of extradition from Great Britain to France, it was held that where the surrender of a fugitive criminal is demanded by the Government of a friendly State for offences within the provisions of the Extradition Act, 1870, and of the Extradition Treaty with that State, the Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice (*In re Arton*, [1896] 1 Q. B. 108).

Procedure of Requisition.—Extradition is an act between States in which their tribunals may co-operate, but it is considered to belong to Governments to decide in the first and in the last resort. This principle is recognised in the provision of sec. 7 of the Extradition Act, 1870, by which the Secretary of State is given power to discharge the arrested fugitive without judicial intervention. Continental States to whom the demand is made verify the identity of the accused, and decide whether the alleged crime constitutes a case for extradition; but, in general, except in England and the United States, it is not inquired whether the accusation is well founded.

Under the Extradition Acts a requisition for the surrender of a fugitive criminal of any foreign State who is in, or suspected of being in, the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign

State (s. 7). The Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. If, however, he is of the opinion that the offence is one of a political character, he may, if he thinks fit, decline to send such an order, and, at any time, may also order the fugitive criminal to be discharged from custody.

The term "diplomatic representative," for extraditional purposes, includes consul-general (s. 7 of 1873 Act). But any police magistrate or justice of the peace, on information or complaint, may issue a provisional warrant on his own authority if the alleged crime is one for which the fugitive could be indicted, if he had committed it within the jurisdiction of the person issuing the warrant. Every police magistrate or justice of the peace issuing such a warrant must forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to the Secretary of State, who may, if he thinks fit, order the warrant to be cancelled, and the accused person to be set at liberty; or, if the magistrate or justice of the peace does not receive a reply from the Secretary of State within a certain fixed and reasonable time, stating that a requisition has been made for the surrender of the fugitive, the prisoner is to be immediately discharged (s. 8 of the 1870 Act).

Competent Police Magistrate.—Under later treaties, the competent magistrate has now been narrowed to "some police magistrate in London" (Anglo-French Treaty, 1876, Art. 7), and this in practice has been still further narrowed down to a police magistrate sitting at the Bow Street Court. Under the amending Act of 1895, respecting "the magistrate by whom, and the place in which, the case may be heard and the criminal held in custody"—

Where a fugitive criminal has been apprehended in pursuance of a warrant under sec. 8 of the Extradition Act, 1870, and a Secretary of State, on representation made by or on behalf of the criminal, is of opinion that his removal for the purpose of his case being heard at Bow Street will be dangerous to his life or prejudicial to his health, the Secretary of State, if it appears to him consistent with the Order in Council under the Extradition Act, 1870, applicable to the case, may, in his discretion, by order stating the reasons for such opinion, direct the case to be heard before such magistrate as is named in the order, and at the place in the United Kingdom at which the criminal was apprehended, or for the time being is (s. 1, subs. 1).

Provided that when the fugitive criminal is committed to prison to await his surrender, the committing magistrate, if of opinion that it will be dangerous to the life or prejudicial to the health of the prisoner to remove him to prison, may order him to be held in custody at the place in which he for the time being is, or any other place named in the order to which the magistrate thinks he can be removed without danger to his life or prejudice to his health, and while so held he shall be deemed to be in legal custody, and the Extradition Acts, 1870 and 1873, shall apply to him as if he were in the prison to which he is committed, and the forms of warrant used under the said Acts may be varied accordingly (s. 1).

This Act was passed to meet the case of Dr. Cornelius Herz, who was put under arrest in 1893 at Bournemouth, but was, and continued, in such a state of health that he could not be removed to London to be examined at Bow Street. After a new convention with France had been made and ratified and brought under the Extradition Acts, the charge was heard partly at Bournemouth and partly at Bow Street, and was dismissed on May 1, 1896 (31 *Law Journ.* 297).

Provisional Detention.—On the subject of provisional detention of fugitives on warrant issued by a police magistrate, the British Foreign Office on December 28, 1888, addressed to Mr. Phelps, United States

Minister at London, a note, dated December 28, 1888, to the following effect :—

When the issue of a provisional warrant of arrest is desired, the application should be made either to a police magistrate at Bow Street or (in cases where it may be more convenient) to any justice of the peace in any part of the United Kingdom, and should invariably be supported by an information in writing, to be laid before the magistrate or justice by the consul or other accredited agent of the foreign Government, who should also produce the despatch, letter, or telegram on which the information is founded (and see U.S. For. Rel. 1889, pp. 462-469).

The form of warrant for provisional arrest is as follows :—

Metropolitan Police District, to wit:

The information of _____, of _____ taken on oath this _____ day of _____, in the year of our Lord one thousand _____ hundred and _____, at the Bow Street Police Court in the county of Middlesex, and within the metropolitan police district, before me, the undersigned, one of the magistrates of the police courts of the metropolis sitting at the police court aforesaid, Who saith that _____, late of _____, is accused [or convicted] of the commission of the crime of _____, within the jurisdiction of _____, and now suspected of being in the United Kingdom. I make this application on behalf of the _____ Government. I produce _____ I am informed and verily believe that a warrant _____ has been issued in for the arrest of the accused; that the said Government will demand his extradition in due course, and that there are reasonable grounds for supposing the accused may escape during the time necessary to present the diplomatic requisition for his surrender, and I therefore pray that a provisional warrant may issue under the provisions of 33 & 34 Vict. c. 52, s. 8.

Proceedings before Police Magistrate.—The Acts provide that the magistrate shall hear the case in the same manner, as near as may be, as if the prisoner were accused of a crime committed in this country, and that he shall receive any evidence tendered to show that the alleged offence is of a political character or is one not covered by the Extradition Acts and Treaties (Act of 1870, s. 10).

In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged (s. 10).

The "foreign warrant" mentioned in this section need not set out the offence in terms that would strictly satisfy the English definition of some extradition crime (*Ex parte Terraz*, 1879, 4 Ex. D. 63). It will be sufficient if it purports to be an official document issued by a Court of competent authority, ordering the arrest of the fugitive criminal, and if the evidence produced before the magistrate justifies committal for an extradition crime (*R. v. Jacobi*, 1882, 46 L. T. (N. S.) 595 n; *Ex parte Piot*, 1883, 48 L. T. (N. S.) 120; 15 Cox C. C. 208; 47 J. P. 247). A document sealed with the seal of the Department of Justice at the Hague, and purporting to be a copy of the record or minutes of a certain order or decree of the Criminal Court of Justice there, setting forth the charges against the fugitive criminal, and authorising his arrest and the proceedings against him, was held to satisfy the requirements of this section as to authentication (*R. v. Ganz*, 1882, 9 Q. B. D. 96).

Depositions taken in a foreign country, or duly certified copies of the same, are, by sec. 14, to be admissible in all proceedings under the Act, whether they have been taken in accordance with our law or not (*Ex parte Counhaye*, 1873, L. R. 8 Q. B. 410).

Before ordering commitment for extradition the Bow Street magistrate must be satisfied (1) that the crimes charged are within the treaty, (2) that they are crimes against the law of the demanding State, (3) that they are crimes within the Extradition Acts of 1870 and 1873, and (4) that there is such evidence of guilt as would in an English case warrant a committal for trial (*In re Arton* (No. 2), [1896] 1 Q. B. 509, at 513; *Ex parte Windsor*, 1865, 34 L. J. M. C. 163; *In re Belencontre*, [1891] 2 Q. B. 121).

There seems to be no jurisdiction to try a fugitive criminal in England for any offence not disclosed by the depositions, etc., on which his extradition was obtained. In *R. v. Jabez Balfour* certain counts which are challenged as not warranted by the extradition papers were withdrawn by the Crown, and the trial and conviction proceeded on the counts not open to this challenge. The same view has been taken in America on the terms of the treaties which are there law without enactment (*U.S. v. Rauscher*, 1886, 119 U.S. 407; and in France, *Bousquet's case*, Clunet, 1896, p. 607).

In the *Meunier* case, on an application for a writ of *habeas corpus*, it was objected among other things that the charges depended on the uncorroborated evidence of an accomplice. It was held that the evidence of the accomplice was corroborated, and, even if it were not, that the absence of corroboration merely affected the weight and not the admissibility of the accomplice's evidence (*In re Meunier*, [1894] 2 Q. B. 415).

If the magistrate orders the prisoner to be committed for extradition, he must inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* (s. 11).

The right of the prisoner to apply for *habeas corpus* does not arise from the Act, but exists at common law (*In re Besset*, 1844, 14 L. J. M. C. 17). The prisoner is entitled under the Habeas Corpus Act, 1679, to a copy of the warrant of commitment. The procedure for obtaining the writ of *habeas corpus* is regulated by the Crown Office Rules of 1886, r. 238. It is made by motion in open Court in the Queen's Bench Division, except in vacation, when it is made by application for a summons. The prisoner must make an affidavit in support of the application, and a copy of the commitment must be produced (C. O. R. 35). The ordinary course is to grant a rule *nisi* and to argue all the questions involved on showing cause against the rule, and not to present any argument on the return to the writ when it has once been ordered to issue (*Ex parte Ganz*, 1882, 9 Q. B. D. 93; *R. v. Portugal*, 1886, 16 Q. B. D. 492). No appeal lies to the Court of Appeal from the grant or refusal of the writ (*Ex parte Woodhall*, 1887, 20 Q. B. D. 832). But the prisoner is entitled to go the round of the Courts or to the Lord Chancellor (*Ex parte Widemann*, 1866, 14 L. T. 719; *In re Pinter*, 1892, 17 Cox C. C. 497). The writ is not granted if there is any appreciable evidence to support the charge (*R. v. Maurer*, 1882, 10 Q. B. D. 513).

Restrictions on Surrender of Fugitives—Political Offences.—The following restrictions are laid down with respect to political offences by sec. 3 of the Act of 1870:—

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the Court before whom he is brought on HABEAS CORPUS, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement that the fugitive criminal shall not,

until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.

The decision in the *Castioni* case ([1891] 1 Q. B. 149) distinguishes between extraditable and political crimes. A number of the citizens of one of the cantons of the Swiss Republic having become dissatisfied with the administration of the Cantonal Government, and risen against it, arrested several members of the Government and seized the arsenal, from which they provided themselves with arms, attacked, broke open, and took forcible possession of the municipal palace, disarmed the gendarmes, imprisoned some of the members of the Government, and set up a provisional government of their own. On entering the municipal palace, Castioni, who had taken an active part in the disturbance throughout, fatally shot with a revolver one Rossi, a member of the Government, and escaped to England, where he was arrested and committed for extradition on a charge of murder. On a motion for *habeas corpus*, it was held (Denman, Hawkins, and Stephen, JJ.) that the offence was incidental to, and formed part of, political disturbances, and therefore was an offence of a political character within the meaning of the statute, and the prisoner could not be surrendered, but was entitled to be discharged from custody. Hawkins, J., however, observed that he entirely dissented from the proposition that any act done in the course of a political rising was necessarily of a political character. Notwithstanding that a man might join in a purely political rising, yet if he deliberately, and as a matter of private revenge, and for the purpose of doing injury to another, shot an unoffending man, no one could question that he would be guilty of the crime of murder; in such a case the offence so committed could not be said to have any relation at all to a political crime.

A fuller definition of a political offence was given some years later in *In re Meunier*, [1894] 2 Q. B. 419. (And in *In re François*, 1 Dec. 1892, Lord Coleridge and Smith, J., held that destruction of property and life by dynamite used by anarchists could not be regarded as a political offence (Clunet, 1893, p. 481).) A prisoner who had been committed for extradition on two charges of causing explosions at a café, and at certain barracks in Paris, applied for a writ of *habeas corpus*. It was proved by witnesses, whose depositions were taken in France, as well as by a voluntary statement on the part of the prisoner, that he was an anarchist. Mr. Justice Cave, in delivering judgment against the prisoner, said :

It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of that object, it is a political offence; otherwise not. In the present case there are not two parties in the State, each seeking to impose the government of their own choice upon the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular government; but anarchist offences are mainly directed against private citizens. I am of opinion, therefore, that the crime charged was not a political offence within the meaning of the Extradition Acts, and that the writ of *habeas corpus* must be refused.

The French Government in 1895 refused an application made by the

British Government for the extradition of Patrick Tynan. The fact that extradition in France is an executive act, and that the legitimacy of the demand is not inquired into in public judicial proceedings, makes the real grounds of refusal a matter of surmise. But the ostensible and sufficient reason for the refusal was that the crime had been committed fourteen years before the application, and therefore, under the Code of Criminal Procedure (Art. 637), by which prosecution for crimes is barred after ten years from the date of their commission, was no longer, according to French law, punishable. The treaty specially provides that the French law of limitation is to be applied to English demands for extradition. See 31 *Law Journ.* 528, 589.

In the *Arton* case it was further decided that, where the surrender of a fugitive criminal is demanded by the Government of a friendly State for offences within the provisions of the Extradition Act, 1870, and of the Extradition Treaty with that State, the Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice. It was also held, in the same case, that the provision of sec. 3, subs. 1, by which a fugitive criminal shall not be surrendered if he proves to the satisfaction of the Court that the requisition for his surrender has been made with a view to try or punish him for an offence of a political character, applies only to an offence of a political character which has been already committed (*In re Arton*, [1896] 1 Q. B. 108).

Compare in this connection the resolutions of the Institute of International Law (*q.v.*) on the distinction of political from ordinary crimes:—

Extradition cannot be granted for purely political crimes or offences, nor for violations of the law mixed up with or connected with political crimes or offences, these being designated relative political offences. This, however, only extends to crimes not of the first gravity in point of morality and ordinary law, such as assassination, murder, poisoning, intentional and premeditated, wounding and mutilating of a serious character, and attempts to commit crimes of this kind, and attacks upon property by arson, explosion, and inundation, as well as serious robbery, in particular when accompanied by armed violence. As regards acts committed in the course of an insurrection or of a civil war by one or the other of the parties engaged in the struggle and in the interest of the cause, they are not extraditable unless they constitute an act of odious barbarity or of vandalism, forbidden by the laws of war, and then only when the civil war has come to an end.

Deeds directed against the foundations of all social organisation, and not only against a particular State or against a particular form of government, cannot be viewed as political offences, as set forth above. (Adopted at Geneva, 1892. See *Tableau général de l'Institut*, p. 105.)

Surrender of Fugitive.—Under sec. 3, subsec. 4, of the Act of 1870 a fugitive criminal may not be surrendered until after the expiration of fifteen days from the date of his being committed to prison to await his surrender. Upon the expiry of the fifteen days, or if a writ of *habeas corpus* has been applied for, after the decision of the Court as to the writ, the Secretary of State, by warrant under his hand and seal, must order the fugitive criminal to be surrendered to such person who may, in his opinion, be authorised by the foreign State in question to receive the fugitive criminal (s. 11). If the criminal is not surrendered to the duly authorised person, and conveyed out of the United Kingdom within two months after his committal, a judge of the Superior Courts, upon application made to him by the prisoner, and upon proof that the prisoner has given reasonable notice to the Secretary of State of his intention to make the application, may order the prisoner to be discharged, unless sufficient cause is shown to the contrary (s. 12). If the prisoner escapes from the custody of the person duly authorised by the foreign Government in question to receive him, it shall be lawful to retake

him in the same manner as an escaped criminal is retaken who has committed a crime within the United Kingdom (s. 11).

Crimes committed at Sea.—Where the crime in respect of which the surrender of a fugitive criminal is sought is committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions have effect:—

(1) The Extradition Acts are construed as if any stipendiary magistrate in England or Ireland, and any sheriff or sheriff-substitute in Scotland, were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate; (2) the criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime; (3) if the fugitive criminal is apprehended on a warrant issued without the order of a Secretary of State he shall be brought before the stipendiary magistrate, sheriff, or sheriff-substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port (s. 16).

Jurisdiction of demanding State.—Extradition is granted by Great Britain only for acts committed within the territorial jurisdiction of the demanding Government, or on its ships on the high seas. An offence committed on a French vessel on the high seas by a Chinese subject has been treated as committed within the jurisdiction of France, and does not afford a ground for the surrender of the criminal to China (*A-G. of Hong Kong v. Kwok-a-Sing*, 1874, L. R. 5 P. C. 179). But where certain persons conspired within the jurisdiction of the Government of the Netherlands to obtain goods by false pretences in the jurisdiction of the Government of Germany, and wrote letters and obtained the goods, and extradition of the criminals was demanded by the Government of Germany, it was held that they were subject to surrender to that Government as for an offence committed within its jurisdiction (*R. v. Jacobi*, 1882, 46 L. T. 595 n; and cp. *R. v. Nillins*, 1884, 53 L. J. M. C. 157).

Surrender of Subjects.—Great Britain in the surrender of fugitive criminals does not distinguish between subjects and foreigners. Many countries decline to carry the principle of the territoriality of crime to this extent, and either try the offenders themselves, if the offence is punishable under their law, or allow them to escape unpunished. "There seems little reason," says Mr. Lawrence, "for a course of action dictated either by an exaggerated notion of a citizen's privileges or by a profound distrust of the administration of justice in foreign lands. A case can always be watched, and in the unlikely event of its being conducted with manifest unfairness, remonstrances can be made. If civilised States have sufficient confidence in one another to enter into Extradition Treaties, they ought to be willing to surrender their own subjects when occasions arise" (*Intern. Law*, p. 239). (Parl. Pap. 1878, C. 2039.)

In the treaties between Great Britain and Switzerland and Spain, it is provided that British subjects shall be surrendered for offences committed in Switzerland or in Spain, although Swiss citizens and Spanish subjects committing offences in England and taking refuge in their own country are not to be surrendered, but are to be tried in Switzerland or in Spain, as the case may be. A few of the extradition treaties of Great Britain contain the provision that neither of the contracting parties shall be bound to deliver up its own citizens or subjects. The treaty with the Netherlands contains this provision, and it has been held that the benefit of it cannot be claimed by the citizen of a third State whose extradition is claimed by the Netherlands (*R. v. Ganz*, 1882, 9 Q. B. D. 93).

Under the treaty of 1874 between this country and the Swiss Govern-

ment it was provided that no Swiss should be delivered up by Switzerland to the Government of the United Kingdom, and no subject of the United Kingdom should be given up by the Government thereof to Switzerland. It has been held that the treaty must be taken to limit the operation of the Act, and that no British subject in this country could be surrendered to the Swiss Government (*R. v. Wilson*, 1878, 3 Q. B. D. 42).

On the other hand, in the case of the treaty between this country and Belgium (May 20, 1876, amended by a declaration of April 21, 1887), containing a clause by which it was expressly provided that "in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalisation," the surrender of a British subject having been demanded by the Belgian Government in respect of certain extradition offences of the commission of which there was sufficient *prima facie* evidence to justify his extradition, and an order for his committal being made by a magistrate with a view to his surrender, it was held that the accused, although a British subject, was a person "liable to be surrendered" within the meaning of sec. 6 of the Extradition Act, 1870, and that the order of committal was rightly made. Under the provisions of the treaty with Belgium, the ordinary proceedings in extradition could be taken in the case of a British subject; it was not necessary that in each particular case the surrender should be the result of negotiations between the respective Governments and of an express consent by the British Government to the extradition (*In re Galwey*, [1896] 1 Q. B. 230).

Evidence for use Abroad.—Police magistrates, on the requisition of the Secretary of State (Act of 1873, s. 5), are to take evidence for the purposes of any criminal matter pending in any foreign Court, and witnesses may be compelled to attend in the same manner as if the evidence were required for an offence committed in the United Kingdom. Sec. 24 empowers foreign States to obtain evidence in the United Kingdom in relation to any criminal matter (not of a political character) pending in their Courts in manner prescribed in 19 & 20 Vict. c. 113.

Fugitive Criminals in British Possessions and Colonies.—The Extradition Acts when applied by Order in Council (Extradition Act, 1870, s. 17, and 1895, s. 2) shall, unless it is otherwise provided by such Order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England as the case may require, but with the following modifications:—

(1) The requisition for the surrender of a fugitive criminal who is in, or suspected of being in, a British possession, may be made to the governor of that British possession by any person recognised by that governor as a consul-general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of which the requisition is made) as the governor of such colony or dependency; (2) no warrant of a Secretary of State shall be required, and all powers vested in, or acts authorised or required to be done, under this Act, by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone; (3) any prison in the British possession may be substituted for a prison in Middlesex; (4) a judge of any Court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

It is also provided by the Extradition Acts (1870, s. 18; 1895, s. 2), that if—

By any law or ordinance made by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals

who are in, or suspected of being in, such British possession, Her Majesty may, by the Order in Council applying the Extradition Acts in the case of any foreign State, or by any subsequent Order either (a) suspend their operation, or any part thereof, within any such British possession so far as they relate to such foreign State, and so long as such law or ordinance continues in force there; or (b) direct that such law or ordinance, or any part thereof shall have effect in such British possession with or without modifications and alterations.

(In the case of Canada the Imperial Acts are suspended during the continuance of the Canada Extradition Act, 1877, by Order in Council of 1883 (St. R. & O., Revised, vol. i.), and the Orders in Council applying the Imperial Acts to subsequent treaties.)

Under this provision many Orders in Council have been made, of which the following is believed to be a complete list:—

COLONY.	COLONIAL LAW.	ORDER IN COUNCIL
Bahamas . . .	Extradition Act, 1877.	Aug. 13, 1877.
Barbadoes . . .	" " 1878.	Nov. 27, 1878.
Bermuda . . .	" " 1877.	Feb. 4, 1879.
British Guiana . . .	{ Ordinance, Aug. 3, 1886. } Extradition Ordinance, 1897.	{ Sept. 24, 1886. } July 7, 1897.
British Honduras . . .	" " 1877.	Feb. 22, 1878.
British India . . .	" (India) Act, 1895.	Nov. 21, 1895.
Cape of Good Hope . . .	" Act, 1877.	Jan. 15, 1878.
Ceylon . . .	" Ordinance, 1877.	{ Oct. 23, 1877. } Feb. 4, 1878.
Gibraltar . . .	" " 1877.	July 11, 1877.
Gold Coast . . .	" " 1877.	Nov. 23, 1877.
Grenada . . .	" " 1880.	Mar. 18, 1880.
Griqualand West . . .	" " 1879.	June 26, 1879.
Hong-Kong . . .	" " 1875.	Mar. 20, 1877.
Jamaica . . .	" Act, 1877.	Nov. 23, 1877.
Leeward Islands . . .	" " 1877.	Mar. 26, 1878.
Malta . . .	" Ordinance No. iv., 1877.	June 29, 1878.
Mauritius . . .	" Act, 1877.	July 11, 1877.
Natal . . .	" Law, 1877.	Feb. 4, 1878.
New Zealand . . .	" Act, 1874.	May 13, 1875.
Queensland . . .	" " 1877.	Mar. 26, 1878.
St. Lucia . . .	" Ordinance, 1877.	Jan. 15, 1878.
St. Vincent . . .	" " 1880.	Aug. 6, 1880.
Sierra Leone . . .	" " 1878.	Nov. 27, 1878.
South Australia . . .	" Act, 1877.	Dec. 11, 1877.
Straits Settlements . . .	" Ordinance, 1877.	July 11, 1877.
Tasmania . . .	" Act, 1877.	Apr. 18, 1878.
Tobago . . .	" Ordinance, 1880.	June 28, 1880.
Trinidad . . .	" " 1877.	{ July 11, 1877. } Nov. 20, 1894.
Victoria . . .	" Act, 1877.	May 16, 1878.
Western Australia . . .	" " 1877.	Feb. 4, 1878.

These Orders in Council are printed in Statutory Rules and Orders, Revised, or in the case of Orders since 1889 in the annual volumes of Statutory Rules and Orders under the title of the colony affected.

Besides these provisions there are also Orders in Council as to extradition from certain colonies in cases to which the Act of 1870 does not apply, e.g. Straits Settlements (St. R. & O., Rev., vol. vii. p. 436; St. R. & O., 1896, No. 967). The treaties with China of 1850 (*Kwok-a-Sing's* case, 1875, L. R. 5 P. C. 179), and with Siam of 3rd September 1883 and November 30, 1885, do not fall under the Extradition Acts.

The extradition of British subjects from places to which the Foreign Jurisdiction Act, 1890, and prior Acts apply is regulated by the Orders in Council as to foreign jurisdiction affecting these places (see St. R. & O., Rev.,

vol. iii., tit. "Foreign Jurisdiction," and the annual volumes under that title). Cyprus comes under this provision (see St. R. & O., Rev., vol. iii. p. 415). Fugitives from British justice under the Foreign Jurisdiction Acts do not appear to be within the Extradition Acts. This view has been taken in the United States.

The Acts are at present defective in that if a fugitive offender committed for extradition in a colony passes through the United Kingdom *en route* to the State of trial the extradition proceedings must be gone through again (*Longdon's case*, 1896, 31 L. J. 252).

In New South Wales there is no local statute on the subject.

It is under the Imperial Act of 1870 that French escapees from the French settlement of New Caledonia are dealt with. . . . Upon receipt of a requisition from the consul of France requiring the extradition of a person supposed to be in the colony, accompanied by proof of the conviction of the person to be dealt with of an extradition crime, and upon production of an affidavit stating that it is believed he is at large in the colony, the governor, acting according to the powers given in England, issues his warrant for the apprehension of the accused. Upon the arrest being made, the prisoner is brought before the governor, who takes evidence upon oath as to the conviction of the accused of a crime for which he may be extradited, and of his sentence not having expired, and if satisfied upon these matters commits the prisoner to Darlinghurst gaol, etc.; the further proceedings being as prescribed by the Act of 1870 (see Legal Year-Book of Australasia, article by W. J. Williams, Crown Solicitor for New South Wales).

Extradition within British Empire.—For extradition between the different parts of the British Empire, see FUGITIVE OFFENDERS.

[*Authorities.*—Clarke, *A Treatise on the Law of Extradition*, 3rd ed., 1888; Moore, *A Treatise on Extradition and Interstate Rendition*, 2 vols., Boston, 1891; Kirchner, *L'Extradition*, London, 1883; Lammasch, *Auslieferung und Asylrecht*, Leipzig, 1887; Billot, *Traité de l'Extradition*, Paris, 1874; Holtzendorff, *Die Auslieferung der Verbrecher und das Asylrecht*, Berlin, 1881; Bernard, *Traité théorique et pratique de l'extradition*, Paris, 1883; Weiss, *Etude sur les conditions de l'extradition*, Paris, 1880; Spears, *The Law of Extradition*, Boston, 1880; W. B. Lawrence, *Etude sur l'Extradition*, Leipzig, 1880; Renault, *Etude sur l'extradition en Angleterre*, Paris, 1879; Calvo, *Dictionnaire de Droit International*, Paris, 1885; Vincent-Penaud, *Dictionnaire de Droit International Privé*, Paris, 1888; Pradier-Fodéré, *Traité de Droit International Public*, vol. iii., Paris, 1887; Ricci, *Des effets de l'extradition*, Paris, 1886; Lawrence, *International Law*, London.]

Extraordinary Traffic.—See HIGHWAYS.

Extra-territorial Crime.—"No proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner cannot be held criminally responsible to the law of a nation not his own for acts done beyond the limits of its territory. . . ." (Cockburn, C.J., *R. v. Keyn*, 1877, 46 L. J. Rep. M. C. 17). On the other hand, "a foreigner committing a criminal offence while on English territory is equally amenable to English law as a subject, except so far, if at all, as he may be exempted therefrom by convention or by some established rule of the law of nations" (Amphlett, J.A., *R. v. Keyn*, *id. supra*).

A British subject who commits a crime or offence outside the Queen's dominions is, like a foreigner, beyond the jurisdiction of the British criminal law, except where by statute otherwise provided.

The cases in which such crimes or offences committed outside the

Queen's dominions have been brought within the jurisdiction of the English Courts, are fixed by the following enactments:—

Murder and Manslaughter.—Sec. 9 of Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), makes provision as to murder or manslaughter committed abroad—

Where any murder or manslaughter shall have been committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner, in all respects, as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland in the same manner as such person might have been tried before the passing of this Act.

Offences by Seamen out of British Territory.—Under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60)—

All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments, and be inquired of, heard, tried, and adjudged in the same manner, and by the same Courts, and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England (s. 689).

And where any person being a British subject is charged with having committed any offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any Court in Her Majesty's dominions, which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had been so committed (s. 686).

Under sec. 689, subsec. 1, whenever any complaint is made to any British consular officer—(a) that any offence against property or person has been committed at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence was committed, or within three months before that time, was employed in any British ship; or (b) that any offence on the high seas has been committed by any master, seaman, or apprentice belonging to any British ship, that consular officer may inquire into the case upon oath, and may, if the case so requires, take any steps in his power for the purpose of placing the offender under the necessary restraint, and of sending him as soon as practicable in safe custody to the United Kingdom, or to any British possession in which there is a Court capable of taking cognisance of the offence, in any ship belonging to Her Majesty or to any of Her subjects, to be proceeded against according to law.

Subsec. 2. The consular officer may order the master of any ship belonging to any subject of Her Majesty bound to the United Kingdom, or to such British possession as aforesaid, to receive and afford a passage and subsistence during the voyage to any such offender as aforesaid, and to the witnesses, so that the master be not required to receive more than one offender for every one hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of that tonnage; and the consular officer shall indorse upon the agreement of the ship such particulars with respect to any offenders or witnesses sent in her as the Board of Trade require.

Subsec. 3. Any master of a ship to whose charge an offender has been so committed shall on his ship's arrival in the United Kingdom or in such British possession as aforesaid,

give the offender into the custody of some police officer or constable, and that officer or constable shall take the offender before a justice of the peace or other magistrate by law empowered to deal with the matter as in cases of offences committed on the high seas.

Subsec. 4. If any master of a ship when required by any British consular officer to receive and afford a passage and subsistence to any offender or witness, does not receive him and afford a passage and subsistence to him, or does not deliver any offender committed to his charge into the custody of some police officer or constable as herein-before directed, he shall for each offence be liable to a fine not exceeding fifty pounds.

Crimes committed in Territorial Waters.—Sec. 2 of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), provides that—

An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, though it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

By sec. 2 of 4 & 5 Will. IV. c. 36, 1834, the Admiralty jurisdiction over "persons charged with certain offences committed on the high seas, and other places within the jurisdiction of the Admiralty of England," was transferred to the then new CENTRAL CRIMINAL COURT.

Jurisdiction outside British Dominions.—See FOREIGN JURISDICTION. Secs. 6 and 7 of the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), provide that—

Where a person is charged with an offence cognisable by a British Court in a foreign country, any person having authority derived from Her Majesty in that behalf may, by warrant, cause the person so charged to be sent for trial to any British possession for the time being appointed in that behalf by Order in Council, and upon the arrival of the person so charged in that British possession such criminal Court of that possession as is authorised in that behalf by Order in Council, or if no Court is so authorised, by the supreme criminal Court of that possession, may cause him to be kept in safe and proper custody, and so soon as conveniently may be may inquire of, try, and determine the offence, and on conviction punish the offender according to the laws in force in that behalf within that possession, in the same manner as if the offence had been committed within the jurisdiction of that criminal Court;

provided *inter alia* that

The Court of the British possession shall admit and give effect to the law by which the alleged offender would have been tried by the British Court in the foreign country in which his offence is alleged to have been committed, so far as that law relates to the criminality of the act alleged to have been committed, or the nature or degree of the offence, or the punishment thereof, if the law differs in those respects from the law in force in that British possession (s. 6).

Where an offender convicted before a British Court in a foreign country has been sentenced by that Court to suffer death, penal servitude, imprisonment, or any other punishment, the sentence shall be carried into effect in such place as may be directed by Order in Council, or be determined in accordance with directions given by Order in Council, and the conviction and sentence shall be of the same force in the place in which the sentence is so carried into effect as if the conviction had been made and the sentence passed by a competent Court in that place (s. 7).

Illegal Enlistment.—If any person without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid, he is guilty of an offence, and punishable by fine and imprisonment (with or without

hard labour), or either (Foreign Enlistment Act, 1890, 33 & 34 Vict. c. 90, s. 4).

For enactments concerning piracy and slavery beyond the Queen's dominions, see for piracy (*q.v.*), *inter alia* 5 & 6 Vict. c. 28, ss. 16-18, and 7 Will. IV. and 1 Vict. c. 88, ss. 2-4; and for slavery, *inter alia* 53 & 54 Vict. c. 27 and 36 & 37 Vict. c. 88.

See FOREIGN ENLISTMENT; FOREIGN JURISDICTION; PIRACY; SLAVE-TRADE.

Ex vi termini—The interpretation of a term by virtue of its own essential meaning, and not by extrinsic evidence, whether the term is used in a philological or a legal sense; *e.g.* in *Christopherson v. Bare*, 1848, 11 Q. B. 477, the word "assault" was said to negative, *ex vi termini*, the idea of permission.

Eyre.—A judicial visitation of the counties by justices appointed for the purpose of hearing all pleas (*ad omnia placita*). In the reign of Henry III., when the eyre system reached its highest development, three or four professional judges, together with a noble, a bishop, or an abbot, would traverse a group of counties under a general commission. There were no regular circuits; the groups of counties varied in arrangement from eyre to eyre. At times, notably in the years 1240 and 1241, the sittings of the Bench at Westminster were suspended, and the administration of the law was carried out entirely by itinerant justices. The most important part of the eyre was the hearing of the Pleas of the Crown. A set of interrogatories, called the *Capitula Itineris* (see STATUTES OF THE REALM), were delivered by the Crown to the judges; and to these interrogatories juries of the different hundreds of each county were in turn sworn to make answer. According to their answers punishment was meted out to transgressors. It was a constitutional principle, though one not always observed, that an eyre could only be held once in every seven years. There is at least one instance in which an eyre was postponed because the necessary interval had not elapsed. In the reign of Edward I. eyres became less frequent, and in the reign of Edward III. they fell into desuetude. The work which had formerly been performed in eyres was gradually transferred to the sittings of the justices of assize and justices of the peace.

[*Authority*.—See Pollock and Maitland, *History of English Law*.]

Fabrication—

Of Evidence.—See FORGERY.

Of Tea and Coffee.—See COFFEE; TEA.

Of Voting Papers.—See BALLOT.

Fabric Lands.—These were lands given for the rebuilding, repair, or maintenance of cathedrals or other churches in ancient times,

when it was common to leave by will, moneys, or lands, *ad fabricam ecclesiæ reparandam*. The Anglo-Saxons called them timber lands.

They were within the operation of the old laws of mortmain, and are now within that of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42); and by sec. 8 of this Act the exemptions from the provisions of former similar Acts contained in any statutes not thereby repealed, were to remain in force. The provisions of the Church Building Act of 43 Geo. III. c. 108 are, therefore, still law; and sec. 1 authorises any person having in his own right any estate or interest in land, or any property of or in goods and chattels, by deed enrolled under 27 Hen. VIII. c. 16 (Inrolment of Bargain and Sale, now in the Central Office of the Supreme Court), or by will duly executed three months before the death of the grantor or testator, to vest in any person, or body politic or corporate, lands not exceeding five acres, or goods and chattels not exceeding £500, towards erecting, rebuilding, repairing, purchasing, or providing any church or chapel of the Established Church, or residence for the officiating minister and other similar purposes. Infants, and women covert without their husbands, are not enabled by the Act. The grantees may take as well from persons charitably disposed to give the same, as from others willing to sell their lands, tenements, or chattels, without licence, notwithstanding the Statute of Mortmain.

By 51 Geo. III. c. 115, amending the prior Act, the king is empowered to grant, for similar purposes, lands in the Duchy of Lancaster not exceeding five acres in one grant; and the owners, individual or corporate, of the fee-simple of a manor are empowered to grant five acres of the waste to the rector, vicar, or other minister, for the purpose of erecting or enlarging a church or chapels of the Church of England, or making or enlarging a churchyard, or as glebe lands. See further for the cases, etc.

[*Authority*.—Tudor, *Charitable Trusts, etc.*, 3rd ed., p. 436.]

Facilities.—See RAILWAY.

Facsimile.—Until 1851 it was the practice, and regarded as essential for good pleading, to set out in facsimile in an indictment, inquisition, or criminal information, any written instrument in respect of or by means of which a crime was charged to have been committed. It is now sufficient to describe the instrument by any name by which it is usually known, or by its purport, and unnecessary to set out a copy or facsimile of the whole or any part thereof, or otherwise to describe the instrument or its value (14 & 15 Vict. c. 100, ss. 5, 7, 30; 24 & 25 Vict. c. 98, ss. 42, 43).

Fact (What is in Law).—The following are matters of fact:—

1. The laws, usages, and customs of foreign countries, including the laws of the colonies (*Prowse v. European and American Steam Shipping Co.*, 1860, 13 Moo. P. C. 484), of the Channel Islands (*Brenan's case*, 1847, 10 Q. B. 492, 498), and of Scotland (*Urquhart v. Butterfield*, 1888, 37 Ch. D. 367, 369, but not apparently the laws of Ireland (*Reynolds v. Fenton*, 1846, 3 C. B. 187, per Maule, J., p. 191). A special mode of proving colonial laws is provided by the British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63).

2. Local and trade customs (*Hammer v. Chance*, 1865, 4 De G., J. & S. 626; per Cockburn, C.J., in *Goodwin v. Roberts*, 1875, L. R. 10 Ex. 337, at pp. 346, 356; notes to *Wigglesworth v. Dallison*, 1779, 1 S. L. C. 528).

3. By-laws of local authorities and railway companies, Orders of Council, and the practice of inferior Courts, except so far as regulated by statute (*R. v. University of Cambridge*, 1736, 2 Raym. (Ld.), 1334; see *Motteram v. S.-E. Ry. Co.*, 1859, 7 C. B. N. S. 58, and various statutes providing special modes of proving by-laws).

4. Private Acts of Parliament passed before 1851, and private Acts passed since that date if expressly so enacted (52 & 53 Vict. c. 63, s. 9).

5. The laws of physical science.

6. Though the Courts take judicial notice of the territorial and political divisions of England and Ireland, the geographical position and situation of particular places must be proved as facts (*Brune v. Thompson*, 1842, 2 Q. B. 789; *R. v. Sympton*, 1738, 2 Raym. (Ld.), 1379; *Deybel's case*, 1821, 4 Barn. & Ald. 242).

[For attempts to define and analyse the legal conception of "facts," see Stephen, *Evidence*, note to art. 1; Holland, *Jurisprudence*, 2nd ed., p. 80; Best, *Evidence*, 8th ed., pp. 6 and 19.]

See JURY; FOX'S LIBEL ACT.

Factor.—*Definition.*—A factor is a mercantile agent who, in the customary course of his business as such agent, is intrusted with the possession or control of goods, wares, or merchandise for sale on commission. The difference between a factor and a broker is that a factor is intrusted with the possession of the goods which he is authorised to sell, and has a special property in and lien upon them, whereas a broker is a mere negotiator, and is not, as a general rule, intrusted with the possession of the goods, and therefore has no such special property or lien (*Baring v. Corrie*, 1818, 2 Barn. & Ald. 137; 20 R. R. 383; *Stevens v. Biller*, 1883, 25 Ch. D. 31). Factors frequently guarantee to their principals the payment of the price of goods sold by them, and are then said to act under a *del credere* commission (see DEL CREDERE AGENT).

Authority.—Subject to the express instructions of his principal, a factor to whom goods are intrusted for sale has implied authority to sell them in his own name (*Baring v. Corrie*, *supra*; *Ex parte Dixon*, *In re Henley*, 1876, 4 Ch. D. 133), on reasonable credit (*Houghton v. Matthews*, 1803, 3 Bos. & Pul. 485, 489; *Scott v. Surman*, 1742, Willes, 406), at such times and for such prices as he thinks best (*Smart v. Sandars*, 1846, 3 C. B. 380); and if he sells them in his own name, to receive payment of the price in the ordinary course of business, and in accordance with the terms of the contract of sale (*Drinkwater v. Goodwin*, 1775, Cowp. 251). He has also implied authority to give a warranty on the sale of the goods, if it is usual in the trade to warrant that particular class of goods (*Dingle v. Hare*, 1859, 7 C. B. N. S. 145). But he has no implied authority to delegate his employment, though acting under a *del credere* commission (*Cochran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 267; *Solly v. Rathbone*, 1814, 2 M. & S. 298). Nor has he implied authority to barter (*Guerreiro v. Peile*, 1820, 3 Barn. & Ald. 616; 22 R. R. 500) or pledge goods (*Martini v. Coles*, 1813, 1 M. & S. 140; *Guichard v. Morgan*, 1819, 4 Moo. K. B. 36), or the bill of lading for goods (*Newsom v. Thornton*, 1805, 6 East, 17; 8 R. R. 378), intrusted to him for

sale, even for the purpose of meeting bills drawn by the principal on, and accepted by, him, which it was agreed should be provided for out of the proceeds of the goods (*Gill v. Kymer*, 1821, 5 Moo. K. B. 503; *Fielding v. Kymer*, 1821, 2 B. & B. 639). The principal may, however, be bound, as between himself and third persons, by the acts and dispositions of a factor in excess of his actual authority, express or implied. It is a principle of the law of agency that third persons dealing with an agent are entitled to assume that he has all the usual powers and authorities, and the acts of the agent within the scope of such ostensible authority are binding on the principal, notwithstanding any special instructions or limitations given or imposed by him, provided that the persons dealing with the agent have no notice of such instructions or limitations. And this principle has been extended, in the case of factors and other mercantile agents intrusted with the possession of goods, or of the documents of title to goods, by the Factors Acts. See PRINCIPAL AND AGENT.

Duties.—It is the duty of a factor to strictly pursue the terms of his authority and instructions (*Smart v. Sandars*, 1846, 3 C. B. 380), and in matters left to his discretion, to act to the best of his judgment for the principal's benefit (*Clarke v. Tipping*, 1846, 9 Beav. 248); to keep and render to the principal just and true accounts of all agency transactions, and to keep the moneys and goods of his principal separate from his own moneys and goods, and from those of other persons (*Clarke v. Tipping*, *supra*; *Gray v. Haig*, 1854, 20 Beav. 219); to keep each sale separate and distinct from other transactions (*Guerreiro v. Peile*, 1820, 3 Barn. & Ald. 616; 22 R. R. 500); to account for goods sold, pay over the proceeds, and deliver unsold goods to the principal, on demand (*Topham v. Braddick*, 1809, 1 Taun. 572; 10 R. R. 610); to take reasonable care of goods intrusted to him for sale (*Coggs v. Bernard*, 2 Raym. (Ld.) 909, 918), and to insure them, if that has been the usual course of dealing between him and the principal (*Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457). As to the estoppel of a factor from denying the title of his principal, and as to the duties arising from the fiduciary character of the relationship, and his general duties as an agent, see PRINCIPAL AND AGENT.

Lien.—Every factor has, by implication from custom, a possessory lien upon the goods and chattels of his principal, for the general balance of account due to him in his capacity of factor, provided that there is no agreement which is inconsistent with such right of lien (*Baring v. Corrie*, 1818, 2 Barn. & Ald. 137; 20 R. R. 383; *Godin v. London Assurance Co.*, 1758, 1 Black. W. 103). The general lien of a factor attaches only upon goods and chattels of which he obtains possession in that capacity (*Dixon v. Stansfeld*, 1850, 10 C. B. 398; *Muir v. Fleming*, 1823, Dow. & Ry. N. P. 29), and is confined to debts becoming due and claims arising in the course of the agency (*Houghton v. Matthews*, 1803, 3 Bos. & Pul. 485; 7 R. R. 815). But it extends to all lawful claims of the factor arising in the course of the agency, whether in respect of remuneration, or advances, or indemnity against losses or liabilities (*Hammonds v. Barclay*, 1802, 2 East, 227; *Pultney v. Keymer*, 1800, 3 Esp. 182; *Drinkwater v. Goodwin*, 1775, Cowp. 251). The lien is excluded if the factor enters into an express agreement which is inconsistent therewith (*Walker v. Birch*, 1795, 6 T. R. 258; *Spalding v. Ruding*, 1843, 6 Beav. 376), or if the goods or chattels are intrusted to him for a special purpose inconsistent therewith (*Burn v. Broom*, 1817, 2 Stark. N. P. 272; 19 R. R. 719; *Frith v. Forbes*, 1862, 4 De G., F. & J. 409; *Brandaß v. Barnett*, 1846, 12 Cl. & Fin. 787). But it is not excluded merely because he acts under special instructions to sell in the name of the principal,

and at a particular price, there being nothing in such instructions inconsistent with a right of general lien (*Stevens v. Biller*, 1883, 25 Ch. D. 31). A factor has no lien upon goods of which he obtains the possession unlawfully (*Madden v. Kempster*, 1807, 1 Camp. N. P. 12), or without the principal's authority (*Taylor v. Robinson*, 1818, 2 Moo. K. B. 730). As to how the lien may be extinguished or lost, and as to possessory liens generally, see POSSESSORY LIEN.

Right of Factor to sue on Contracts of Sale.—A factor, having a special property in the goods, has a right to sue in his own name upon contracts of sale made on behalf of his principal (*Snee v. Prescott*, 1743, 1 Atk. 248; *Fisher v. Marsh*, 1865, 6 B. & S. 411). This right, however, ceases on the intervention of the principal, and is subject to any right of set-off the purchaser may have as against him (*Sadler v. Leigh*, 1815, 4 Camp. N. P. 195), except where the factor has a lien on the goods sold. Where the factor has a lien on the goods, and sells them in his own name, his right to sue the purchaser and compel payment of the price to himself has priority to the right of the principal to sue, so long as the claim secured by the lien remains unsatisfied (*Drinkwater v. Goodwin*, 1775, Cowp. 251); and a settlement with or set-off against the principal cannot be set up by the purchaser to the prejudice of the factor's claim, unless the purchaser was induced by the conduct of the factor to believe that he acquiesced in a settlement being made with the principal, or that he (the purchaser) would be entitled to such right of set-off (*Robinson v. Rutter*, 1855, 4 El. & Bl. 954; *Grice v. Kenrick*, L. R. 5 Q. B. 340). In such a case, the authority of the factor to sue and give a discharge is irrevocable, and is not affected by the bankruptcy of the principal (*Drinkwater v. Goodwin*, *supra*; *Robson v. Kemp*, 1802, 4 Esp. 233; *Hudson v. Granger*, 1821, 5 Barn. & Ald. 27).

How far Principal bound by a Settlement with or Set-off against Factor.—Where a factor sells goods in his own name, and the buyer deals with him as a principal, believing him to be selling his own goods, the buyer is discharged from liability by a payment to or settlement with the factor in any manner which would have operated to discharge him if the factor had been selling his own goods (*Ramazotti v. Bowering*, 1859, 7 C. B. N. S. 851; *Coates v. Lewes*, 1808, 1 Camp. N. P. 444; 10 R. R. 725); and the principal is only entitled to intervene and sue on the contract subject to any defence, including that of set-off, which would have been available against the factor at the time when the buyer first received notice that the factor was not the principal in the transaction (*George v. Clagett*, 1797, 7 T. R. 359; 4 R. R. 462; *Borries v. Ottoman Bank*, 1873, L. R. 9 C. P. 38; *Carr v. Hinchliff*, 1825, 7 Dow. & Ry. K. B. 42; *Ex parte Dixon*, 1876, 4 Ch. D. 133; *Rabone v. Williams*, 1785, 7 T. R. 360; 4 R. R. 463). But the buyer has no right, in an action by the principal, to set off a debt due from the factor, unless he believed the factor to be selling his own goods and the right of set-off accrued before he received notice to the contrary (*Semenza v. Brinsley*, 1865, 18 C. B. N. S. 467; *Fish v. Kempton*, 1849, 7 C. B. 687; *Cooke v. Eshelby*, 1887, 12 App. Cas. 271). See also PRINCIPAL AND AGENT.

[*Authorities.*—Bowstead on *Agency*; Story on *Agency*; Campbell on *Commercial Agency*; Evans on *Principal and Agent*.]

Factorage.—The wages, commission, or allowance paid to a FACTOR by a merchant. Jacob, *Law Dict.*

Factories and Workshops.

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I. DEFINITIONS.

Every place in which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the making of any article or part of any article, or altering, repairing, ornamenting, or finishing it, or otherwise adapting it for sale, is *prima facie* either a "factory" or a "workshop," if the employer of those who work there has the right of access to the place, or has control over it. If any machinery moved or worked by steam, water, or other mechanical power is used in such manufacture or in aid of such manual labour, the place is a "factory." If no machinery moved or worked by any mechanical power is used there, the place is, speaking generally, a "workshop." But to this general rule there are exceptions. Thus print works, bleaching and dyeing works, earthenware or china works, lucifer match works, percussion-cap works, cartridge works, paper-staining works, fustian-cutting works, blast furnaces, copper mills, iron mills, foundries, metal and indiarubber works, paper mills, glass works, tobacco factories, letterpress printing works, bookbinding works, and flax scutch mills, are factories and not workshops, whether mechanical power is used in them or not. This is because all these work places (except flax scutch mills) had been treated as "factories" prior to 1878, and it was not desirable to alter the regulations affecting them.

A part of any factory or workshop may be in law a separate factory or workshop (F. & W. Act, 1878, s. 93); thus, if two distinct manufacturing processes or handicrafts be carried on within the same close or curtilage, the premises may be treated as two factories, or two workshops, or as a factory and a workshop. A factory or a workshop is not necessarily a building; it need not be roofed over; it may be in the open air. (The decisions in *Kent v. Astley*, 1869, L. R. 5 Q. B. 19; 39 L. J. M. C. 3; and *Redgrave v. Lee*, 1874, L. R. 9 Q. B. 363, are no longer law; see F. & W. Act, 1878, s. 93.) Thus, a shipbuilding yard, a quarry, or a pitbank is a factory, if steam or other mechanical power be used there; if not, it is a workshop. So docks, wharves, quays, warehouses, and buildings in construction or under alteration are now factories for certain purposes (F. & W. Act, 1895, s. 23). A rope works, in which the yarn is twisted into rope or twine by steam or water power, is a factory; one in which the yarn is twisted by a hand-wheel is a workshop; so with cement works. Factories and workshops belonging to the Crown may, in case of any public emergency, be exempted by a Secretary of State from the operation of the Acts to the extent and during the period named by him. The children attending any

recognised efficient school may be taught any art or handicraft there without the school becoming technically a "workshop." If, however, the school exists solely for the purpose of teaching children or young persons an art or handicraft (*e.g.* a plait school or a lace school), it will, it is submitted, still be a workshop (*Beadon v. Parrott*, 1871, L. R. 6 Q. B. 718). But a private house or room in which a family dwell, and work at straw-plaiting, pillow-lace making, or glove making, or (by order of a Secretary of State) other handicrafts of a light character, is not a workshop (F. & W. Act, 1878, s. 97). Nor is a private house or room in which a family dwell, and do manual labour occasionally, provided such labour is exercised only at irregular intervals, and does not furnish the whole or principal means of living to such family (F. & W. Act, 1878, s. 98).

At the end of 1896 there were 83,095 factories and 110,234 workshops on the registers of H.M. Inspectors of Factories at Whitehall. And the Home Secretary may by order direct that different branches or departments of work may, so far as regards the period of employment of children, young persons, and women, be treated as if they were different factories or workshops (F. & W. Act, 1895, s. 39). Two such Orders have been made, dated respectively February 11, 1896, and March 27, 1897.

Textile and non-Textile Factories.—Factories are now divided into two distinct classes, textile and non-textile. The expression "textile factory" means any place or premises in which steam, water, or other mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, either separately or mixed together, or mixed with any other material, or any fabric made thereof. It does not, however, include print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, or hat works.

The expression "non-textile factory" means (1) any print works, bleaching and dyeing works, earthenware works, lucifer match works, percussion-cap works, cartridge works, paper-staining works, fustian-cutting works, blast furnaces, copper mills, iron mills, foundries, metal and india-rubber works, paper mills, glass works, tobacco factories, letterpress printing works, bookbinding works, and flax scutch mills.

(2) Also any hat works, rope works, bakehouses, lace warehouses, ship-building yards, quarries, and pitbanks, in which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

(3) Also any premises in which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes:—

- (a) The making of any article or of part of any article; or
- (b) The altering, repairing, ornamenting, or finishing of any article; or
- (c) The adapting for sale of any article,

and in which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there (F. & W. Act, 1878, s. 93).

"Child" means a person under fourteen; but a child of thirteen who has obtained from the proper school authority a certificate of having attained the necessary standard of proficiency in reading, writing, and arithmetic, or of previous due attendance at a certified efficient school, is to be deemed a young person (F. & W. Act, 1878, ss. 26, 30, 96).

"Young person" means a person who has ceased to be a child, but is under eighteen.

"Woman" means a female who is over eighteen.

"Night" means the period from 9 p.m. to 6 a.m. (F. & W. Act, 1878, s. 96).

"Machinery" includes any driving strap or band.

"Process" includes the use of any locomotive (F. & W. Act, 1891, s. 37).

"Mill-gearing" comprehends every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process (F. & W. Act, 1878, s. 96); it therefore includes every wheel which aids in the manufacturing process, except the operative wheel (*Holmes v. Clarke*, 1861, 6 H. & N. 349; 7 H. & N. 937).

II. INSPECTION AND CONTROL.

All factories and workshops are now regulated by the four Factory and Workshop Acts, passed in 1878, 1883, 1891, and 1895 respectively (41 Vict. c. 16; 46 & 47 Vict. c. 53; 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37). The first of these codified and repealed the whole of the pre-existing law on the subject; but the later Acts, especially that of 1895, have introduced so many important changes that it would be well if the four Acts were at once consolidated. The provisions of these Acts are enforced by a small army of inspectors appointed by the Home Secretary, four of whom are ladies, with a chief inspector (B. A. Whitelegge, Esq., M.D.) and six superintending inspectors at their head. These inspectors are also charged with the duty of enforcing the Truck Acts, 1831 to 1896, in their respective districts (50 & 51 Vict. c. 46, s. 13; 59 & 60 Vict. c. 44, s. 10; and see TRUCK ACTS).

An inspector may enter, inspect, and examine any factory or workshop, and any part of it, at all reasonable times by day and by night. He may enter by day any place which he has reasonable cause to believe to be a factory or workshop (F. & W. Act, 1878, s. 68). He may take a constable with him into any factory or workshop in which he has reasonable cause to apprehend that he will be obstructed in the execution of his duty (*ibid.* and F. & W. Act, 1895, s. 45). If he thinks that there is on the premises any drain or water-closet out of order, or any other nuisance which is remediable or punishable under the Public Health Acts, and not under the Factory and Workshop Acts, he may take with him into the factory or workshop the medical officer of health or the inspector of nuisances for the district (F. & W. Act, 1878, s. 4). An inspector of factories may examine any person whom he finds in any factory or workshop, and require him or her to sign a declaration of the truth of the matters respecting which he or she is so examined. Any person obstructing the inspector, or refusing to answer his questions, is liable to a penalty (F. & W. Act, 1878, s. 68). Everyone who opens a new factory or workshop, or converts a workshop into a factory, must within one month serve written notice of the fact on the inspector for the district (F. & W. Act, 1878, s. 75; 1891, s. 26; 1895, ss. 41, 44 (1)).

The chief inspector also appoints a certifying surgeon for each district, whose duties are to examine children and young persons, and certify that they are fit for the proposed employment, and also to investigate and report on accidents occurring in any factory or workshop (F. & W. Act, 1878, ss. 27, 28, 29, 32, 71; 1895, s. 18).

Abstracts of the provisions of the Factory and Workshop Acts are issued by the Queen's printer, and the abstract prescribed for each particular

kind of factory or workshop must be kept constantly affixed in some prominent position on the premises, where it can be easily read by the persons employed. With it must be exhibited notices stating the name and address of the inspector for the district to whom any complaint or notice should be sent, the name and address of the certifying surgeon, the number of persons who may lawfully be employed in each room of the factory or workshop without overcrowding, the hours for which women, young persons, and children are employed, the time allowed for meals, and the name of the public clock by which these hours are regulated (F. & W. Act, 1878, ss. 76, 78; 1895, ss. 1 (3) and 40).

In addition to the provisions of the four Factory and Workshop Acts and the Truck Acts, whenever the Home Secretary certifies that any machinery or process or particular description of manual labour used in a factory or workshop (other than a domestic workshop) is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, or that the provision for the admission of fresh air is not sufficient, or that the quantity of dust generated or inhaled in any factory or workshop is dangerous or injurious to health, the chief inspector may serve on the occupier of the factory or workshop a notice in writing, either proposing such special rules, or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable, and to meet the necessities of the case. If within twenty-one days after receipt of such notice the occupier raises no objection, the special rules will at once come into force. If he objects or proposes modifications, his objections or suggestions will be considered by the Home Secretary, who may assent to them. If he does not, the matter may be referred to arbitration (F. & W. Act, 1891, s. 8). The workmen are entitled to be represented on such an arbitration (F. & W. Act, 1895, s. 12). The award will settle what special rules shall come into force, or what requirements must be complied with. And as soon as such special rules are thus established, they will be binding on employer and employed alike; and printed copies of them must be posted up in conspicuous places in the factory or workshop. They can be subsequently amended (F. & W. Act, 1891, s. 10). If any person, whether master or workman, acts in contravention to any special rule, or fails to comply with it, he will be liable on summary conviction to a fine not exceeding £10 (F. & W. Act, 1891, s. 9).

But it must be borne in mind that none of the provisions of the Factory and Workshop Acts apply to—

(i.) Any young person, being a mechanic, artisan, or labourer, working only in repairing either the machinery in, or any part of a factory or workshop.

(ii.) The process of gutting, salting, and packing fish immediately on its arrival in the fishing boats (F. & W. Act, 1878, s. 100).

(iii.) The process of cleaning and preparing fruit, so far as is necessary to prevent spoiling, on its arrival at a workshop in June, July, August, and September (F. & W. Act, 1891, s. 32).

(iv.) The occupations of straw-plaiting, pillow-lace making, and glove making (F. & W. Act, 1878, s. 97).

(v.) Manual labour exercised in a private house or room by the family dwelling therein, or any of them, provided it is exercised at irregular intervals, and does not furnish the whole or principal means of living to such family (F. & W. Act, 1878, s. 98).

(vi.) The employment of women in flax scutch mills, which are conducted on the system of not employing either children or young persons therein, and, which are worked intermittently, and for periods only which do not exceed in the whole six months in any year (F. & W. Act, 1878, s. 62).

III. SANITARY PROVISIONS.

All factories, whether textile or non-textile, must be kept clean and free from all effluvia from any drain, privies, or other nuisance; and must be ventilated so as to render harmless, so far as practicable, all gas, dust, etc., that may be generated in the course of the manufacture (F. & W. Act, 1878, s. 3). Where necessary, the inspector may order a fan or other ventilating contrivance to be used (*ibid.* s. 36; 1895, s. 33).

All inside walls of rooms, and all ceilings or tops of rooms, and all passages and staircases in any factory (unless in the case of any non-textile factory a special exemption has been granted) must be limewashed every fourteen months, or, if they have been painted with oil or varnished within seven years, must be washed every fourteen months (F. & W. Act, 1878, s. 33; 1891, ss. 3, 4). All bakehouses must be limewashed every six months. See *BAKEHOUSE*, vol. i. p. 466.

In all factories and workshops sufficient sanitary conveniences, with separate accommodation for each sex, must be provided (F. & W. Act, 1895, s. 35). Whenever lead, arsenic, or other poisonous substance is used, suitable washing conveniences shall be provided. See *post*, p. 305, *What Lead Works*. Adequate measures must be taken to secure and maintain a reasonable temperature in each room, and to avoid any excess of humidity in the air (F. & W. Act, 1895, ss. 31, 32).

No child, young person, or woman may be employed in any textile factory where wet spinning is carried on, unless sufficient means are provided for protecting the workpeople against being wetted, and, where hot water is used, for preventing the escape of steam into the room in which they work (F. & W. Act, 1878, s. 37).

Overcrowding.—No factory or workshop may be overcrowded while work is carried on therein so as to be dangerous or injurious to the health of the persons employed therein (F. & W. Act, 1878, s. 3, as amended by 1891, s. 5). What amount of overcrowding was dangerous or injurious was formerly a question left to the discretion of the Court in each case. But now a more precise meaning has been given to the word "overcrowding" by sec. 1 of the F. & W. Act, 1895. There must in no case be less than 250 cubic feet of space for each worker in a room, and 400 cubic feet during overtime. The Home Secretary may, however, modify this proportion for any period during which artificial light other than electric light is employed, or he may raise the figure in respect of any particular manufacturing process or handicraft. A notice must be affixed in a prominent position in every factory and workshop stating how many people may be employed in each room.

All these provisions as to cleanliness, overcrowding, ventilation, limewashing, etc., are enforced in the case of factories by the inspectors of factories; in the case of workshops by the officers of the local sanitary authority, or, if they make default, by the Home Secretary.

IV. SAFETY OF THE WORKPEOPLE AND THE PUBLIC.

The Factory and Workshop Acts contain many most valuable provisions for securing the safety of the persons employed, and also of the public. Thus, it is provided, that in every factory, whether textile or not, every hoist or teagle, and every fly-wheel directly connected with the steam or water or other mechanical power, whether in the engine-house or not, and every part of any water-wheel or engine worked by any such power, must be securely fenced. Every wheel-race, not otherwise secured, must be securely fenced close to the edge.

All dangerous parts of the machinery and all parts of the "mill-gearing" must either be securely fenced, or be in such a position or of such construction as to be equally safe to every person as they would be if securely fenced (F. & W. Act, 1878, s. 5, as amended by 1891, s. 6, and 1895, s. 7). A very wide interpretation has been placed upon this section (*Redgrave v. Lloyd & Sons*, [1895] 1 Q. B. 876; *Hindle v. Birtwistle*, [1897] 1 Q. B. 192).

No person may work between the fixed and traversing part of any self-acting machine, except when the machine is stopped with the traversing part on the outward run (F. & W. Act, 1895, s. 9).

A child may not clean any part of the machinery while it is in motion by the aid of steam, water, or other mechanical power (F. & W. Act, 1878, s. 9).

A young person may not clean any dangerous part of the machinery in motion (F. & W. Act, 1895, s. 8; *Pearson v. Belgian Mills Co.*, [1896] 1 Q. B. 244).

A young person or woman may not clean any "mill-gearing" while in motion (F. & W. Act, 1878, s. 9).

On the application of an inspector, a Court of summary jurisdiction may order that work shall cease on dangerous premises, or may prohibit the use of any machine dangerous to life or limb (F. & W. Act, 1895, ss. 2, 4).

Accidents.—Whenever an accident occurs in any factory or workshop which prevents the injured person, on any one of the three working days next after the occurrence of the accident, from being employed for five hours on his ordinary work, written notice must be sent to the inspector for the district (F. & W. Act, 1895, s. 18).

If the accident is fatal, or is produced either by machinery moved by power, or from a vat, pan, etc., containing hot liquid, molten metal, or other substance, or from explosion, or from escape of gas, steam, or metal, notice must also be sent to the certifying surgeon (*ibid.*).

Cases of lead, phosphorus, and arsenical poisoning, and anthrax, must also be reported to the inspector and the certifying surgeon (F. & W. Act, 1895, s. 29).

Every occupier is required to keep a register of accidents, and enter the details of every accident within one week of its occurrence (F. & W. Act, 1895, s. 20; see also F. & W. Act, 1878, ss. 32, 82; 1891, s. 22; 1895, ss. 13, 19, 21, and the Notice of Accidents Act, 1894, 57 & 58 Vict. c. 28, *ante*, vol. i. p. 65). The provisions of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), also apply to factories (s. 7); see EMPLOYERS' LIABILITY, *ante*, p. 10.

Fire.—Sufficient provision must be made for escape in case of fire. The doors must not be so locked or fastened that they cannot be easily and immediately opened from inside. Every new factory or workshop must be built either with sliding-doors or doors that open outwards (F. & W. Act, 1891, s. 7; 1895, s. 10).

Outworkers.—By the Act of 1895, an attempt is also made to make the employer responsible for the condition of the place in which his work is done by outworkers. If an inspector gives the employer notice that any such place is dangerous or injurious to health, he must cease within a month to give out work to be done in that place, or he will be liable to a fine, unless the place has in the interval ceased to be dangerous or injurious (s. 5). And, in particular, if any employer causes or allows wearing apparel to be made, cleaned, washed, or repaired in any dwelling-house, or building occupied therewith, whilst any inmate of the dwelling-house is suffering

from scarlet fever or smallpox, then, unless he proves that he was not aware of the existence of the illness in the dwelling-house, and could not reasonably have been expected to become aware of it, he will be liable to a fine not exceeding £10 (s. 6). And the duty is also imposed on the occupier of every place from which working apparel is given out to be made, and of every factory or workshop in which wearing apparel, electro-plate, files, cabinets, furniture, or upholstery is made, and also on every contractor employed by any such occupier, to keep a list in the prescribed form of the names and addresses of all outworkers employed by him. These lists are to be open to the inspection of any inspector of factories, and of the officers of the local sanitary authority; and copies of them, correct up to date, must be sent to the inspector on or before the 1st March and the 1st September in each year (F. & W. Act, 1891, s. 27; 1895, s. 42).

V. EMPLOYMENT OF CHILDREN, YOUNG PERSONS, AND WOMEN.

No child under the age of eleven years may be employed at all in any factory or workshop (F. & W. Act, 1891, s. 18), nor any child who has not passed the standard prescribed by the local authority (43 & 44 Vict. c. 23, s. 4). Children, above eleven, who have passed that standard, may be employed, but only on the half-time system, *i.e.* either in morning and afternoon sets, or else on alternate days (F. & W. Act, 1878, s. 23). When not at work, they must attend day schools regularly, and the employer must obtain every week a certificate that each child in his employ has so attended, which must be shown to the inspector when required (s. 24). Where a child works on alternate days only, he may be employed for as many hours as a young person; but never on two successive days or on the same day of the week in any two successive weeks.

It is the duty of the parent or guardian of the child to see that he attends a recognised efficient school, once on each work-day, if the child works in a morning or afternoon set; twice on every alternate work-day, if the child is employed on alternate days. If a child has not made the requisite number of attendances in any week, he is not to be employed till he has made up the required number (s. 23).

No child or young person under sixteen may be employed without a certificate of fitness from the certifying surgeon of the district; and when a child becomes a young person, a fresh certificate of fitness is necessary (F. & W. Act, 1878, ss. 27-30; and see 1891, s. 20; 1895, s. 46).

No young person or woman may be employed (as a rule) for more than twelve hours, of which there must be allowed for meals not less than two hours in a textile factory, and not less than one and a half hours in a non-textile factory or workshop; in either case one hour of meal-time must be before 3 p.m. On Saturdays they must have at least half an hour during the morning for meal-time, and a half-holiday, commencing in some cases at 12.30, in others at 1, but never later than 2 p.m. if work began at 6 a.m. But see F. & W. Act, 1878, ss. 46, 47; 1891, s. 15. On Sundays, no child, young person, or woman may be employed at all in any factory or workshop (F. & W. Act, 1878, s. 21); except in the case of Jews (see *post*, p. 299), and in the case of a male young person of at least fourteen years of age working in day and night shifts (*ibid.* s. 58).

The periods during which children, young persons, and women are employed in any factory or workshop must be clearly stated on a table prefixed to the notice, which, as we have seen (*ante*, p. 292), must be fixed up in a conspicuous place in every factory and workshop. No child, young person, or woman may be employed in any factory or workshop except

during the period of employment shown in that table. The period shown on the table cannot be altered until notice of the alteration has been served on the inspector and also fixed up on the premises (F. & W. Act, 1878, s. 19).

No young person or child may be employed in any part of a factory or workshop in which either the process of silvering mirrors by the mercurial process or the process of making white lead is carried on.

No child or female young person may be employed in any part of a factory in which the process of melting or annealing glass is carried on.

No girl under the age of sixteen years may be employed in any factory or workshop in which is carried on the business of making or finishing bricks or tiles, other than ornamental tiles; or of making or finishing salt.

No child may be employed in any part of a factory or workshop in which any dry grinding in the metal trade or any dipping of lucifer matches is carried on (F. & W. Act, 1878, s. 38 and Sched. I.).

In workshops conducted on the system of not employing children and young persons, after due notice given by the employer to an inspector, women may work for a specified period of twelve hours between 6 a.m. and 10 p.m. on an ordinary working day, and of eight hours between 6 a.m. and 4 p.m. on Saturdays. But there must be allowed to each woman for meals and absence from work during such period one hour and a half on each ordinary working day, and on Saturday not less than half an hour (F. & W. Act, 1891, s. 13). But no work may be done on Sunday.

All necessary particulars respecting the children and young persons employed must be entered in the prescribed register-book, together with information as to limewashing, accidents, etc.

Holidays.—The Acts also contain minute provisions as to holidays. These are, as a rule (in England and Wales), Christmas Day, Good Friday, and the four Bank holidays. But for each of these days another holiday or two half-holidays may be substituted, provided due notice of the alteration be given by the employer a fortnight beforehand, and that one-half of such substituted holidays be between 15th March and 1st October. Such notice must be sent to the inspector and also fixed up on the premises. All children, young persons, and women in the same factory or workshop must, as a rule, have the same days for holidays (F. & W. Act, 1878, ss. 22, 49, 50; 1891, s. 39 and Sched. II.; 1895, s. 17).

No employer may knowingly allow any woman to return to work within four weeks after she has given birth to a child (F. & W. Act, 1891, s. 17).

Piece-work.—In textile factories every person paid by the piece shall have supplied to him with his work sufficient particulars to enable him to ascertain the rate of his wages. In the worsted and woollen trades the particulars applicable to weavers' work must also be posted on a placard (F. & W. Act, 1895, s. 40 (1)). The Secretary of State has power to extend this section to non-textile factories and workshops, and has extended it (with some modifications) to manufactures of handkerchiefs, aprons, pinafores, and blouses (Order of April 22, 1897, No. 309), of steel and iron cables, chains, anchors, and grapnels (*London Gazette* for August 17, 1897, p. 4611), of locks, latches, and keys (*ibid.* p. 4812). If any worker discloses such particulars to anyone for the purpose of divulging a trade secret he will be liable to a penalty.

VI. MEAL-TIMES.

Children, young persons, and women must all have the same meal-times, and must not, during meal-times, be employed in any manner, or be allowed to remain in any room in which a manufacturing process or

handicraft is being then carried on, except in the cases specified in Part II. of Sched. III. to the Act of 1878 (ss. 39, 52).

No child, young person, or woman may be employed continuously for more than four and a half hours in a textile factory, or for more than five hours in a non-textile factory or a workshop, without at least half an hour's interval for a meal or rest. But see sec. 48. In a textile factory, however, a five hours' spell is sometimes permitted; see *Special Exceptions*, *post*, p. 299.

No child, young person, or woman may take a meal, or remain during the times allowed for meals, in the parts of the factories and workshops hereinafter specified, viz. :—

1. In the case of glass works, in any part in which the materials are mixed.
2. In the case of glass works where flint glass is made, in any part in which the work of grinding, cutting, or polishing is carried on.
3. In the case of lucifer match works, in any part in which any manufacturing process or handicraft (except that of cutting the wood) is usually carried on.
4. In the case of earthenware works, in any part known or used as dippers' house, dippers' drying room, or china scouring room.
5. In any part of a factory or workshop in which part wool or hair is sorted or dusted, or in which fags are sorted, dusted, or ground.
6. In any part of a textile factory in which part gassing is carried on.
7. In any part of a printwork, bleachwork, or dyework in which part singeing is carried on.
8. In any part of a factory or workshop in which part of any of the following processes are carried on :—
 - Grinding, glazing, or polishing on a wheel.
 - Brass-casting, typefoundry.
 - Dipping metal in aquafortis or other acid solution.
 - Metal bronzing.
 - Majolica painting on earthenware.
 - Catgut cleaning and repairing.
 - Cutting, turning, polishing bone, ivory, pearlshell, snailshell.
9. In any factory or workshop in which chemicals or artificial manures are manufactured, except in any room used solely for meals.
10. In any factory or workshop in which white lead is manufactured, except in any room thereof used solely for meals.
11. In any part of a factory or workshop in which part dry powder or dust is used in any of the following processes :—
 - Lithographic printing.
 - Playing-card making.
 - Fancy box making.
 - Paper staining.
 - Almanac making.
 - Artificial flower making.
 - Paper colouring and enamelling.
 - Colour making.

See sec. 39 and Sched. II. of the F. & W. Act, 1878; and the Order of December 22, 1882.

VII. OVERTIME AND NIGHTWORK.

No child may be employed overtime. It is true that in certain non-textile factories and workshops specified in sec. 54 of the F. & W. Act, 1878 (the number of which the Secretary of State has power to extend), a child may be employed at the end of a day's work for an extra half-hour, in order to complete an unfinished job. But every such extra half-hour must be deducted from the total number of hours that such child works in that week. On the same condition a woman or young person may also be employed for an extra half-hour at the end of a day's work to complete a job.

There are only two other cases in which a young person may be employed overtime: (a) Where such overtime employment is necessary for the purpose only of preventing any damage which may arise from spontaneous combustion in the process of Turkey red dyeing, or from any extraordinary atmospheric influence in the process of open-air bleaching (F. & W. Act, 1878, s. 55); and (b) in factories driven by water power, and liable to be stopped by drought or flood, the Secretary of State may authorise the employment of young persons from 6 a.m. to 7 p.m., with intervals for meal hours, on days other than Saturday. In the latter case overtime must not be worked, where the danger is from drought, on more than ninety-six days, or where the danger is from floods, on more than forty-eight days, in any year, and it must not extend beyond the time already lost during the previous twelve months (F. & W. Act, 1878, s. 57, and an Order of the Home Secretary gazetted on December 22, 1882, which does not extend to children).

A woman may be employed overtime under the same three sections (ss. 54, 55, and 57 of the Act of 1878); and also in the following cases:—In certain non-textile factories and workshops in which there is a danger of the materials being spoiled by the weather, or where there is a press of work at certain seasons or from unforeseen causes (namely, those specified in Part III. of the Third Schedule of the F. & W. Act, 1878), and also in all warehouses attached to any factory, textile or non-textile (F. & W. Act, 1895, s. 37, subs. (2)), a woman (but not a young person) (F. & W. Act, 1895, s. 14, subs. (1)) may be employed from 6 a.m. to 8 p.m., or from 7 a.m. to 9 p.m., or from 8 a.m. to 10 p.m. on certain conditions, one of which is that she must be allowed at least two hours for meals. Under sec. 56 of the F. & W. Act, 1878, women may also be employed overtime in the processes of making preserves from fruit, of preserving or curing fish, of making condensed milk, and of preparing cream, and making butter and cheese in a non-textile factory (Sched. III. Part V., and Order of August 22, 1893). It will be observed that in all these cases the articles are very readily perishable. But no woman may be employed overtime under sec. 53 of the F. & W. Act, 1878, for more than three days in any one week, nor for more than thirty days in any twelve months. And no woman may be employed overtime in pursuance of sec. 56 of that Act for more than sixty days in any twelve months (F. & W. Act, 1895, s. 14, subs. (2)).

Women employed in laundries may work overtime, subject to the conditions set out in subs. (4) of sec. 22 of the F. & W. Act, 1895.

The same Act contains a new and important provision, the object of which is to secure that no child, young person, or woman who has already done a full day's work in a factory or workshop should be further employed on the same day by the same employer, at home, or elsewhere outside the factory or workshop. There was nothing to prevent this in the earlier Acts. But now employment outside a factory or workshop on the business of the factory or workshop is prohibited (except during the authorised period), in the case of a child, on any day during which the child is employed in the factory or workshop, and in the case of a young person or woman, on any day on which he or she is employed in the factory or workshop both before and after the dinner hour. And where the occupier of a factory or workshop also keeps a shop, and employs the same young person or woman there, as well as in the factory or workshop, the total period of employment in both taken together must not exceed the number of hours which is prescribed for employment in the factory or workshop alone. There is a similar provision in the Shop Hours Act, 1892, applying to young persons and children who are employed during one part

of the day in a factory or workshop, and during another part of the same day in a shop, to the knowledge of the shopkeeper. See SHOP HOURS ACTS.

No overtime may ever be worked on a Saturday, or on any day substituted for Saturday as a holiday (F. & W. Act, 1895, s. 14), except in the case of a factory or workshop owned by a Jew; as to which, see sec. 50 of the Act of 1878.

Nightwork.—Young male persons of more than fourteen years of age may be employed during the night, on certain conditions, which are set out in sec. 58 of the Act of 1878 (F. & W. Act, 1895, s. 14, subs. (3) (4)); but not, as a rule, for more than six nights in a fortnight. Such male young persons may also be employed in three shifts of not more than eight hours each, provided that there is an interval of two unemployed shifts between each two shifts of employment (F. & W. Act, 1895, s. 38). A male young person over sixteen years of age may be employed in a newspaper printing office at night during not more than two nights in a week, but not for more than twelve hours continuously (F. & W. Act, 1878, s. 59; 1895, s. 14 (5)). As to glass works, see F. & W. Act, 1878, s. 60. No woman, child, or female young person can ever be employed after 10 p.m. in any factory or workshop, very seldom after 9 p.m., and generally not after 8 p.m.

VIII. SPECIAL EXCEPTIONS.

In certain classes of factories and workshops exceptions to the above regulations are permitted. But before any of these exceptions can be acted on, a notice in the prescribed form must be sent to the inspector for the district, and another notice, stating the conditions on which the exception is allowed, must be fixed up on the premises, and kept affixed so long as the exception is acted on. The forms of notice may be obtained from the Queen's printers.

The exceptions granted are of various kinds. In all factories and workshops of which the occupier is a Jew, time lost by closing on Saturday may be made up on certain conditions, and workpeople who are also Jews may work on Sunday (F. & W. Act, 1878, ss. 50, 51; *Goldstein v. Vaughan*, [1897] 1 Q. B. 549; 66 L. J. Q. B. 380). In certain non-textile factories and workshops permission has been granted to employ young persons and women from 9 a.m. to 9 p.m., with the ordinary intervals for meals (F. & W. Act, 1878, s. 43). In lace factories male young persons above sixteen years of age may be employed for longer hours on certain conditions (s. 44); and in bakehouses they may be employed between 5 a.m. and 9 p.m. on certain conditions (s. 45). In certain factories and workshops another day may be substituted for Saturday as a half-holiday (s. 46). In certain cases holidays may be given on different days to different sets of children, young persons, and women (s. 49); the meal-hours of different sets may be different (s. 52); and children, young persons, and women may remain in the workroom during meal-times (s. 52). In certain non-textile factories and workshops the Secretary of State may allow women to work overtime on sixty days in the year, if he is satisfied that such overtime employment is necessary by reason of the perishable nature of the articles or materials manufactured (F. & W. Act, 1878, s. 56; 1895, s. 14 (2)). In factories driven by water only, the Secretary of State may allow time lost through drought or floods to be made up on certain conditions (F. & W. Act, 1878, s. 57). By a special exception, contained in sec. 48 of the F. & W. Act, 1878, children, young persons, and women may be employed continuously for a period of five hours, on certain conditions,

between the 1st November in any year and the 31st March next following, but at no other time of the year, and only in the following textile factories :—

(1) Factories solely used for—(a) the making of elastic web, or (b) the making of ribbon, or (c) the making of trimming ;

(2) Hosiery factories ;

(3) Woollen factories in the counties of Oxford, Wilts, Worcester, Gloucester, and Somerset ;

(4) Factories in which the only processes carried on are those of winding and throwing raw silk, or either of such processes.

This exception is known as “the five hours’ spell.” It is subject to the further condition that the period of employment for young persons and women, as fixed by the occupier and specified in the notice, begins at the hour of 7 a.m., and that the whole time between that hour and 8 a.m. is allowed for meals.

The exceptional cases in which work overtime is permitted have already been stated, *ante*, pp. 297, 298.

Any person acting on an exception without proper notice, or without observing the conditions, is liable to a penalty. Should it subsequently appear to the Home Secretary that such exception is injurious to the health of the children, young persons, or women employed, or is no longer necessary for carrying on the business in the class of factories or workshops to which the exception was so granted, he may rescind his former order (F. & W. Act, 1878, s. 64).

IX. SPECIAL CLASSES OF FACTORIES AND WORKSHOPS.

Certain kinds of factories and workshops have received special treatment from the Legislature and the Secretary of State.

1. *Alkali Works*.—Alkali works are regulated by Acts passed in 1881 and 1892 respectively (44 & 45 Vict. c. 37 ; 55 & 56 Vict. c. 30), and supervised by inspectors appointed by the Local Government Board. See ALKALI WORKS, vol. i. p. 221.

2. *Bakehouses*.—The F. & W. Act, 1878, contained many valuable provisions, which, however, applied only to bakehouses in cities and populous towns (ss. 34, 35). The F. & W. Act of 1883 imposed further regulations on all bakehouses erected, let, or occupied as bakehouses for the first time after June 1, 1883. Now, by sec. 27 of the F. & W. Act, 1895, these restrictions of time and place are removed, and the former provisions apply generally to all bakehouses, wherever situated, and whenever erected, let, or occupied as bakehouses ; with this addition, that in future no place under ground may be used as a bakehouse, unless it was so used on January 1, 1896. See BAKEHOUSE, vol. i. p. 465.

3. *Brass and other Alloy Works*.—Special rules have been prescribed under sec. 8 of the F. & W. Act, 1891, and sec. 28 of the F. & W. Act, 1895, for the regulation of all processes in the mixing and casting of brass, gun metal, bell metal, white metal, delta metal, phosphor bronze, and manilla mixture. It is the duty of the employer to provide adequate means for facilitating the escape of all noxious fumes or dust arising from these processes, either by means of traps or louver gratings in the roof or ceiling of the mixing or casting shop, or if that shop is under any other shop, there must be an adequate flue or shaft, unconnected with any furnace or fireplace, to carry off the fumes through the upper shop to the outer air. All such mixing or casting shops, whether they are factories or workshops under the F. & W. Acts, must be cleaned down and limewashed once at least

within every twelve months, or once within every six months, if so required by notice in writing from an inspector of factories. The date of each such cleaning down and limewashing must be recorded in a register of the prescribed form. A sufficient supply of metal basins, water, and soap must be provided for the use of all persons employed in such mixing or casting shops. No woman or female young person may be employed in any process whatever in any such mixing or casting shop, or in any portion of it which is not entirely separated off by a partition, extending from the floor to the ceiling. No woman and no person under eighteen years of age may take any meal or remain in any casting shop during the time allowed for meals (F. & W. Act, 1878, s. 39). And none of the persons employed, whatever their age or sex, may partake of, or cook, any food in any such mixing or casting shop within a period of at least ten minutes after the completion of the last pouring of metal in that shop.

4. *Buildings* in course of construction or structural alteration by means of machinery worked by steam, water, or other mechanical power, are now, by sec. 23 of the F. & W. Act, 1895, brought under certain provisions of the F. & W. Acts. The Home Secretary has the power to issue special rules and regulations in respect of dangerous processes carried on on such premises (though he has not yet thought fit to exercise such power), and also to prohibit the use of dangerous machines. In case of accidents, the notices prescribed by sec. 18 of the Act of 1895 must be given, and inquiries may be held; the employer may be ordered to make compensation to a workman injured by breach of any rule or requirement. The provisions of the Act of 1895 with respect to notice of accidents and the formal investigation of accidents also apply to (a) any building which exceeds thirty feet in height, and which is being constructed or repaired by means of a scaffolding; and (b) any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), also applies to any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of such construction, repair, or demolition (s. 7).

5. *Chemical Works*.—Special rules have also been made to protect the health of the workpeople employed in chemical works. See CHEMICAL PROCESS, and note the following additional points. Every uncovered pot, pan, or other structure containing liquid of a dangerous character must now be so constructed as to be at least three feet in height above the ground or platform, except where it is proved to the satisfaction of an inspector that a height of three feet is impracticable, in which case the pot, pan, or structure must be securely fenced. A clear space must be left round such pots, pans, or other structures; where any junction exists, a barrier must be so placed as to prevent passage. Caustic pots must be constructed so as to have no footing on the top or sides of the brickwork; dome-shaped lids must be used where possible. No unfenced planks or gangways may be placed across open pots, pans, or other structures containing liquid of a dangerous character, except in the case of a black ash vat, which is itself otherwise securely fenced. All dangerous places must be thoroughly and efficiently lighted.

Suitable respirators must be provided for the use of the workers in places where poisonous gases or injurious dust may be inhaled. Every

place where caustic soda or caustic potash is manufactured must be supplied with syringes or wash bottles enclosed in covered boxes fixed in convenient places, in the proportion of one to every four caustic pots. They must be of suitable form and size, and be kept full of clean water. Similar appliances must be provided wherever an inspector deems them desirable. In any room where chlorate of potash or other chlorate is ground, overalls, kept in a cleanly state, must be provided for all workers, and a bath must be kept ready for immediate use. In every chlorate mill, tallow or other suitable lubricant must be used instead of oil. Respirators charged with moist oxide of iron or other suitable substance must be kept in accessible places ready for use in cases of emergency arising from sulphuretted hydrogen or other poisonous gases. In salt cake departments, suitable measures must be adopted to obviate the escape of low-level gases. All chambers must be ventilated as far as possible when packing is being carried on, by means of open doors and openings in the roof on opposite sides so as to allow of a free current of air.

6. *Cotton Cloth Factories* are regulated by the Cotton Cloth Factories Acts, 1889 and 1897 (52 & 53 Vict. c. 62, and 60 & 61 Vict. c. 58), and also to some extent by the F. & W. Acts, 1891 and 1895. See COTTON CLOTH FACTORIES, vol. iii. p. 518.

Note the following additional points. Any person making or uttering any false entry in the statutory form recording the thermometer readings is liable to a penalty not exceeding £20, or three months' imprisonment, under the F. & W. Act, 1878.

And the amounts fixed by sec. 13 of the Act of 1889 (see vol. iii. p. 518) cannot be reduced below the prescribed minimum, in spite of the general words of sec. 4 of the Summary Jurisdiction Act, 1879 (*Osborne v. Wood Brothers*, [1897] 1 Q. B. 197). The Secretary of State is now empowered to make further regulations for the purpose of carrying into effect the recommendations contained in the report of a Departmental Committee, dated February 17, 1897 (60 & 61 Vict. c. 58, s. 1).

7. *Docks, Wharves, etc.*—By the F. & W. Act, 1895, s. 23, subs. (1) the following provisions, namely—

- (i.) Sec. 82 of the Act of 1878 ;
- (ii.) The provisions of the Factory and Workshop Acts with respect to accidents ;
- (iii.) Sec. 68 of the Act of 1878 with respect to the powers of inspectors ;
- (iv.) Secs. 8 to 12 of the Act of 1891 with respect to special rules for dangerous employments ; and
- (v.) The provisions of the Act of 1895 with respect to the power to make orders as to dangerous machines—

are to have effect as if every dock, wharf, quay, and warehouse, and all machinery and plant used in the process of loading or unloading therefrom or thereto were included in the word "factory," and the purpose for which the machinery is used was a manufacturing process.

8. *Domestic Workshops.*—Any private house, room, or place—

- (i.) which, though used as a dwelling, is by reason of the work carried on there a factory or a workshop within the meaning of the F. & W. Acts ;
- (ii.) in which neither steam, water, nor other mechanical power is used in aid of the manufacturing process carried on there ; and
- (iii.) in which the only persons employed are members of the same family dwelling there—

is a "domestic workshop" (F. & W. Act, 1878, s. 16 ; 1891, s. 37), and as such exempt from many regulations which apply to ordinary factories and workshops. Thus in a domestic workshop there is no restriction imposed

on the employment of women; but young persons can only be employed between 6 a.m. and 9 p.m., and 6 a.m. and 4 p.m. on Saturdays; children can only be employed between 6 a.m. and 1 p.m., or between 1 p.m. and 8 p.m., and 1 p.m. and 4 p.m. on Saturdays. Each young person must be allowed for meals and rest during such period of employment not less than four hours and a half on ordinary workdays, and on Saturday two hours and a half. A child shall only be employed in morning and afternoon sets, changing every week. The child must attend school either in the morning or afternoon of every week-day except Saturday; and it is the duty of his parents to see that he does so attend school. A child may not be employed for more than five hours without an interval of half an hour (F. & W. Act, 1878, s. 16). No overtime can be worked in any domestic workshop (*ibid.* Sched. III. Part III. (3) a).

9. *Earthenware and China Factories.*—The proprietor of every factory for the manufacture of earthenware and china goods must provide all female workers employed in the dipping-house or dippers' drying-room, or in any processes of ware cleaning after the dipper, glost placing, china scouring, ground laying, or majolica painting, with suitable overalls and head coverings, which they must wear, and which must be washed every seven days. No one may cook, or partake of, any food, or remain during meal-times in the dipping-house, dippers' drying-room, china scouring room, glost placers' shop, ground-laying shop, or majolica-painting room. The employer must, in all processes and descriptions of manual labour, as far as practicable, adopt measures for the removal of dust, and for the prevention of any injurious effects arising therefrom, either by the use of mechanical fans, ventilation, or other efficient means. The floors of the workshops and of all such stoves as are entered by the workers must be sprinkled and swept every working day, and the scraps and dirt removed, and the work-benches and stafrs cleansed at least once a week. Washing conveniences and a sufficient supply of water, soap, and nail-brushes must be provided for all workers employed in the dipping-house or dippers' drying-room, or in any processes of ware cleaning after the dipper, glost placing, china scouring, ground laying, or majolica painting, as close as is practicable to the workshops; and every person employed in such places or processes must carefully clean and wash his or her hands and face before meals and before leaving the works.

All stoves, all workshops, and indeed all parts of the factory, must be effectually ventilated by mechanical or other efficient means. The temperature of any workshop during working hours shall not be allowed to exceed 90 degrees (Fahrenheit).

10. *Flax Scutch Mills* are non-textile factories and, as such, are subject to the sanitary regulations and the provisions as to fencing machinery, etc., which apply to any other non-textile factory. But the regulations of the F. & W. Acts with respect to the employment of women do not apply at all to a flax scutch mill, which is conducted on the system of not employing either children or young persons, provided notice has been duly served on the inspector of the intention of the occupier to conduct the mill on that system, and provided the mill be worked only intermittently, and for periods only which do not exceed in the whole six months in any year. In such a mill female labour is entirely unrestricted (F. & W. Act, 1878, s. 62).

11. *Laundries* were not either factories or workshops prior to the F. & W. Act, 1895; till that Act passed they were subject only to the provisions of the Public Health Acts. But by sec. 22 of that Act many of the most

important provisions of the Factory Acts were applied to laundries, namely, those which relate to the sanitary condition of the premises, safety of the workpeople, holidays, accidents, notices, abstracts of the Acts, education of children, powers of the inspector, fines, and legal proceedings. And these provisions will be enforced as if every laundry in which steam, water, or other mechanical power is used were a factory, and every other laundry a workshop. The section also contains special provisions regulating the hours of employment of children, young persons, and women, the overtime work of women, ventilation of the premises, etc. . But note that this section does not apply to any laundry in which the only persons employed are—

(a) Inmates of any prison, reformatory, or industrial school, or other institution for the time being subject to inspection under any Act other than the Factory Acts; or

(b) Inmates of an institution conducted in good faith for religious or charitable purposes; or

(c) Members of the same family dwelling there, or in which not more than two persons dwelling elsewhere are employed (F. & W. Act, 1895, s. 22, subs. (3)).

12. *Lucifer Match Factories*.—No one may carry on a lucifer match factory in which white or yellow phosphorus is used, unless such factory is certified by an inspector to be in conformity with the following special rules:—

(a) The employer must provide an apartment or apartments, separate from other portions of the factory, for the processes of mixing, dipping, and drying.

(b) He must take effectual means to prevent the fumes arising from those processes, and from the boxing department, entering the rest of the factory.

(c) He must provide efficient means, both natural and mechanical, for thorough ventilation in the mixing, dipping, drying, and boxing departments.

(d) He must provide washing conveniences, fitted with a sufficient supply of hot and cold water, soap, nail-brushes, and towels, and take measures to secure that every worker washes his or her hands and face before meals and before leaving the works.

(e) If anyone employed in such a factory complains of toothache or of swelling of the jaw, he must at once be examined by a medical man, at the expense of the employer; and if any symptoms of necrosis are present, the case must be immediately reported to one of the inspectors for the district.

(f) No person who has suffered from necrosis may resume work in such a factory until a certificate of fitness has been obtained from a qualified medical practitioner.

(g) No one may work in the processes of mixing, dipping, drying, or boxing after the extraction of a tooth without the certificate of a duly qualified medical practitioner that the jaw is healed.

13. *Quarries*.—Every quarry, that is to say, every place not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals, is now either a factory or a workshop (F. & W. Act, 1878, Sched. IV. Part II.). It is a non-textile factory if steam, water, or other mechanical power is used in aid of the work done there; if no such power is used, it is a workshop (s. 93). The decision in *Kent v. Astley*, 1869, L. R. 5 Q. B. 19, is no longer law. But by the Quarries Act, 1894 (57 & 58 Vict. c. 42), the inspection and control of every quarry, any

part of which is more than twenty feet deep, is transferred to the inspectors under the Metalliferous Mines Regulation Acts, 1872 and 1875 (who are also appointed by the Home Secretary); certain sections of those Acts specified in the Schedule to the Quarries Act now apply to such quarries, and secs. 31 and 32 of the F. & W. Act, 1878, do not. In such a quarry young persons may work in three shifts of not more than eight hours each. The provisions of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), also apply to such a quarry (s. 7).

14. *Tenement Factories.*—Where different portions of the same building are occupied by different persons for the purpose of any manufacturing process or handicraft and mechanical power is supplied to the different portions in such manner that each such portion is in law a separate factory, the whole building is called "a tenement factory." The owner of the whole building formerly escaped liability so long as he occupied no portion of it. But now by sec. 24 of the F. & W. Act, 1895, the owner of the building (whether he occupies any part of it or not) will be liable, instead of the occupiers of the various portions, for the observance, and punishable for non-observance of those provisions of the F. & W. Acts which are specified in that section, *e.g.* those relating to the sanitary condition of the whole building, the fencing of all machinery not supplied by the occupiers, and certain other matters falling properly under his control. He may also be put in the place of the occupier if the premises be dangerous, and special rules be made under sec. 8 of the F. & W. Act, 1891. But sec. 24 does not apply in the case of any occupier paying a rate in excess of £200 a year. The owner of a non-textile tenement factory where grinding is carried on is also required to observe certain special regulations mentioned in sec. 25 of the F. & W. Act, 1895.

15. *White Lead Works.*—The regulations relating to white lead works are very stringent. The employer is bound to provide respirators, overall suits and head coverings, which must be worn by all persons employed in the blue beds, white bed, setting stoves, drawing stoves, washing and crushing, grinding, and paint-mixing departments. The last four of these departments must also be specially ventilated. Every stack must be fitted with a standpipe or moveable hose, and an adequate supply of water, distributed by a very fine rose or watering can, for damping the white bed before stripping. Every white bed must be adequately watered on removal of the boards, and all trays of corrosions must be well saturated with water before they are passed through the rollers. No female may be employed without a certificate of fitness from a medical man, which must be obtained within one week from her entering the employment. No person shall resume employment after absence through illness, without a certificate from a medical man. The wearing of shoes and stockings is optional, but no female may wear the same shoes and stockings in the works as she wears in going to and from the works.

Bath accommodation must be provided sufficient for all men and women employed; and an adequate supply of hot and cold water, soap, brushes, and towels in each bath-room and lavatory. A sufficient supply of approved sanitary drink must also be provided, and kept in close proximity to the workers in each department, who must drink it at the times stated in a notice affixed in the factory. There must also be dressing-rooms, a dining-room, lavatories, and a cloak-room in which the ordinary clothes of all workers are to be kept apart from their working clothes.

Each man or woman working at any white bed, or in setting or drawing stoves, or in the washing and crushing, grinding, or paint-mixing depart-

ments, before going to breakfast, dinner, or home, or before entering the dining-room for any purpose whatever, must—

(a) Put off the overall suit, etc., and give the same to the person in charge, or leave it in the clothes-room;

(b) Brush every particle of lead dust from his or her clothes;

(c) Thoroughly wash face and hands in the lavatory, and be particular that no dust remain underneath the finger nails;

(d) If not wearing stockings and boots, thoroughly wash the feet.

Each man or woman must bathe at least once a week, and must wash in the lavatory before bathing.

All articles of clothing which have been used in the stoves must be collected and thoroughly washed at the end of every day's work; all those which have been used in other departments must be washed once a week. The general lavatory must be thoroughly cleansed and supplied with clean towels after every meal; the dressing-rooms, baths, and w. c.'s must be brushed and cleansed daily. The workers must not leave any clothes in the dining-room, or their ordinary clothes in any work-room. The managers must examine all persons going out of the works, and not allow them to leave unless they are properly cleansed from lead.

No person may smoke or use tobacco in any workplace or room, or take food in any part of the works, except in the dining-room.

The factory must be visited every week by a doctor, who must examine every worker individually, and enter the result of each examination in the proper register, kept for the purpose. Upon any person complaining of being unwell, the employer must, with the least possible delay, give an order upon the doctor; and upon any person desiring medicine, a dose of the prescribed medicine, kept at the works, must be administered. Every case of illness from lead-poisoning must at once be reported, both to the inspector for the district, and to the certifying surgeon.

Under sec. 9 of the F. & W. Act, 1891, every person employed is bound to observe these special rules, as well as the employer, and is liable to penalties for non-compliance with them; and it is the duty of all managers, etc., to report immediately to the employer any instance which comes under their notice of any worker disobeying or neglecting the prescribed regulations.

Special rules have also been made by the Home Secretary, under sec. 8 of the F. & W. Act, 1891, in the following dangerous employments:—Bichromate works; electric accumulator works; enamelling of iron plates works; explosive manufactures, where di-nitro-benzole is used; flax-spinning and weaving works; wool and hair sorting works; red, orange, and yellow lead works; lead-smelting works; works in which yellow chromate of lead is used; works for the manufacture of paint and colour, and the extraction of arsenic; and works for tinning and enamelling iron hollow ware, metal hollow ware, and cooking utensils, with the aid of lead or arsenic. And on December 1, 1896, the Home Secretary also certified that in his opinion the process of vulcanising indiarubber by means of bisulphide of carbon, and the processes incidental thereto, were "dangerous or injurious to health," within the meaning of subsec. (1) of sec. 8 of the F. & W. Act, 1891; but no rules have as yet appeared to regulate these industries.

Copies of all rules in force must be posted up, in the factory or workshop to which they apply, in conspicuous places, where they may be conveniently read by the persons employed. Such copies can be obtained from the Queen's printers. Any person who wilfully injures or defaces

them is liable to a penalty not exceeding £5 (F. & W. Act, 1891, s. 11). • Occupiers of factories and workshops, and all persons employed therein, who are bound to observe any special rules, are liable to penalties for non-compliance under secs. 9 and 11 of the F. & W. Act, 1891.

Factors Acts.—See PRINCIPAL AND AGENT.

Faculty and Court of Faculties.—A faculty in ecclesiastical law signifies a permission given by the ordinary (or in some cases the Archbishop of Canterbury) for the doing some act which is unlawful without it. The faculties which must be obtained from the Archbishop of Canterbury (in both provinces alike—see ARCHBISHOP) are (1) a faculty to be ordained deacon under twenty-three years of age; (2) to hold two livings at once; (3) to be married at any place or time; (4) to act as a notary public (as to which, see *infra*), and his powers are derived from Stat. 25 Hen. VIII. c. 21, 1533. A faculty for (2) is more usually called a dispensation, and as to it see PLURALITIES; for (3), more often called a special licence, see LICENCE, MARRIAGE. Faculties ordinarily so called relate to alterations in ecclesiastical buildings and lands, and are obtained from the consistory Court of the ordinary or bishop of the diocese. Cathedrals are exempt from the law requiring a faculty before such alterations are made (*Phillpotts v. Boyd*, 1875, 6 L. R. P. C. 435, at p. 456; and see DEAN AND CHAPTER); but in all other cases a faculty is necessary. Thus it is required for a vault, and may be obtained for this purpose by a living non-parishioner (see *In re Sargent*, 1890, 15 P. D. 168), for the removal of a body, for which purpose it will be granted on sanitary grounds (see, e.g., *Rector, etc., of St. Michael Bassishaw v. Parishioners*, [1893] Prob. 233), but not with a view to cremation (*q.v.*); and for the erection of a monument (see as to monuments in chancels, article CHANCEL). Faculties are also required for all additions to the furniture or ornaments of a church; e.g. for a second altar (see *In re Holy Trinity Church, Stroud Green*, 1887, 12 P. D. 199, and *Vicar, etc., of St. Peter's, Eaton Square v. Parishioners*, [1894] Prob. 350), for a chancel screen (see case last cited, and *Vicar of Richmond, etc. v. All Persons, etc.*, [1897] Prob. 70), for candlesticks on the altar, etc., and for all alterations in the fabric of the building; and, strictly speaking, for alterations of importance in the parsonage house or buildings (see, however, *Huntly v. Russell*, 1849, 13 Q. B. 572), and for a new pathway in the churchyard (see *Batten v. Gedge*, 1889, 41 Ch. D. 507; and *Rector, etc., of St. Gabriel v. City of London Real Property Co.*, [1896] Prob. 95); but as to public footpaths, or the throwing part of the churchyard into a street, see *In re Plumstead Burial Ground*, [1895] Prob. 225; and Phillimore, *Eccles. Law*, p. 1415. An ornament though illegally put up cannot be legally removed without a faculty (*Ritchings v. Cordingley*, 1868, L. R. 3 Ad. & Ec. 113; *Vincent v. Eyton*, [1897] Prob. 1); and an ornament put up without one can be subsequently confirmed by faculty (*Gardner v. Ellis*, 1874, L. R. 4 Ad. & Ec. 265; *Bradford v. Fry*, 1878, 4 P. D. 93). See ORNAMENT. Faculties were formerly freely granted for family pews, but in view of modern conditions are now hardly ever granted for this purpose. When a right to a pew by user is established, a lost faculty is presumed (see *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749). They are not necessary for the lawful obedience of a monition under the P. W. R. A., 1874 (37 & 38 Vict.

c. 85, s. 14). The Court of Faculties is a Court in which no litigation is conducted, and is, in fact, the office of the Archbishop of Canterbury for the granting of faculties. Its chief officer is called the master of the faculties, and to him application must be made for the admission or removal of notaries public (see as to these, Statutes 41 Geo. III. c. 79; 3 & 4 Will. IV. c. 70; 6 & 7 Vict. c. 90; and article NOTARY PUBLIC).

[*Authority*.—Phillimore's *Ecc. Law*, 2nd ed.]

Faggot Vote.—A faggot vote was a vote created for party purposes at parliamentary elections by transferring to a person not otherwise qualified for the electoral franchise the bare amount of property sufficient to give him the necessary legal qualification.

Where property was conveyed to an individual with the fraudulent intent of giving him the qualification for a vote without giving him the substance of the property, the vote so acquired was termed a "faggot vote" (see Hansard, *Parliamentary Debates*, vol. xxxvi. col. 945).

The use of the word faggot in this sense is apparently derived from its analogy to the employment of the term faggot as denoting a dummy soldier, i.e. a person temporarily hired to supply a deficiency on the muster of a regiment (see Murray, *Eng. Hist. Dict.* vol. iv. p. 20).

After the establishment of a property qualification for the electoral franchise (see 8 Hen. VI. c. 7; see also FRANCHISE, ELECTORAL) the practice arose of splitting up interests in freeholds by means of conveyances of freeholds of the annual value of forty shillings, with the object of increasing the number of qualified voters at parliamentary elections.

This practice of creating votes by subdividing a single tenement among a number of nominal owners, which was greatly facilitated by the considerable depreciation in the value of the forty shillings freehold qualification, became prevalent towards the end of the seventeenth century to such an extent as to amount to a serious evil, which has been met by various legislative enactments.

The practice was clearly void at common law as being opposed to public policy (see *Onslow v. Rapley*, Lord Somers' *Tracts*, 2nd ed., 1812, vol. viii. at p. 275), and the statute of 1696, 7 & 8 Will. III. c. 25, usually known as Lord Somers' Act, or the "Splitting Act," which was the first legislative attempt to put an end to it, was merely declaratory of the common law.

By sec 6. of that Act all conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, borough, town corporate, port, or place, in order to multiply voices or to split and divide the interest in any houses or lands among several persons to enable them to vote at elections of members to serve in Parliament, were thereby declared to be void and of no effect, and no more than one single voice was to be admitted for one and the same house or tenement.

The Elections (Fraudulent Conveyances) Act, 1711, 10 Anne, c. 31, after reciting the above section, and that notwithstanding such provision to the contrary many fraudulent and scandalous practices had been used of late to create and multiply votes at the election of knights of the shire to serve in Parliament, to the great abuse of the ancient law and custom, to the great injury of those persons who have just right to elect, and in prejudice of the freedom of such elections, for the more effectual preventing such undue practices enacted that all estates and conveyances whatsoever made to any persons in any fraudulent or collusive manner on purpose to qualify

them to give their votes at such elections, subject nevertheless to conditions or agreements to defeat or determine such estate, or to reconvey the same, should be deemed against those persons who executed them as free and absolute, and be held and enjoyed by the persons to whom such conveyances were made freely and absolutely, discharged from all trusts, conditions, clauses of re-entry, powers of revocation, provisos of redemption, or other defeasances whatsoever, between or with the said parties or any other persons in trust for them. It was also enacted that all collateral securities for the revocation of such conveyances should be void, and that persons executing or voting upon such conveyances should be liable to a penalty of forty pounds.

The provisions of the Elections (Fraudulent Conveyances) Act, 1711, were extended to cities and towns being counties of themselves by the Parliamentary Elections (Fraudulent Conveyances) Act, 1739, 13 Geo. II. c. 20; see also the Parliamentary Elections Act, 1745, 19 Geo. II. c. 28.

In consequence of it being doubtful whether devises of land by will made for the purpose of creating votes were within the true intent and meaning of the Statute 7 & 8 Will. III. c. 25, s. 6, the Parliamentary Elections Act, 1813, 53 Geo. III. c. 49, s. 1, expressly provided that all devises by will made for such purposes were to be deemed to be conveyances within the meaning of that section.

The numerous decisions upon the construction of these statutes conclusively show that conveyances for valuable consideration are not void under the statutes, even though they were intended to multiply votes and actually had that effect, provided that they were made *bonâ fide* and without fraud. Thus a conveyance of land by one vendor to several purchasers for a *bonâ fide* consideration is valid, although the avowed object of the vendor is to multiply, and that of the purchasers to acquire, the right of voting (*Alexander v. Newman*, 1846, 2 C. B. 122; see also *Beswick v. Ashworth*, 1846, *ibid.* 152; *Beswick v. Aked*, 1846, *ibid.* 156; *Rawlins v. Bremner*, 1846, *ibid.* 166). And a conveyance made to carry into effect a real *bonâ fide* contract of sale when the purchase money is paid and the possession taken, without any secret reservation or trust whatever for the benefit of the vendor, is not within the statute of 1696, notwithstanding it is made with a view to the multiplying of votes or the splitting of freeholds; the intention of the statute being to avoid such conveyances only made with that view as are in themselves fraudulent and collusive (*Riley v. Crossley*, 1846, 2 C. B. 146). It has also been decided that a conveyance made for a *bonâ fide* consideration in trust as to one-tenth for the grantor himself, and as to the other nine-tenths for certain other parties who amongst themselves contributed nine-tenths of the purchase money, is not within the statute, notwithstanding that the avowed object of the grantor was to multiply, and of the other parties to acquire, the right of voting (*Thoruley v. Aspland*, 1846, 2 C. B. 160). So also where a father in good faith executed a deed of gift in favour of his sons, which was expressed to be in consideration of natural love and affection, it was held to be valid, although the avowed object of the father was to confer votes upon his sons (*Newton v. Hargreaves*, 1846, 2 C. B. 163; see also *Newton v. Overseers of Mobberley*, 1846, *ibid.* 203; *Newton v. Overseers of Crowley*, 1846, *ibid.* 207).

In order to render a conveyance void under the statute of 1696 as having been made in order to multiply votes, or to split and divide the interest in any houses or lands, it must be shown that the vendor was a party to the illegal object intended by the conveyance (*Marshall v. Bown*, 1845, 1 Lut. 278). So where the owners of a house in a borough contracted to

sell it for a valuable consideration to A., who, after such contract, sold it *bonâ fide* to six other persons, and caused the conveyance to be made from the original owners to them, A.'s object being to increase the number of voters in the borough, but the object of the six purchasers being a *bonâ fide* investment of their money, though they expected that the possession of the property would entitle each of them to vote, it was held that, as it did not appear that the parties conveying had any knowledge of the object for which the house was purchased, the conveyance was not void under the statute (*ibid.*). And it has been held that a *bonâ fide* purchase of land for a valuable consideration is not rendered void under the statute, even though the purchasers bought the land with the object of splitting and dividing the interest therein among themselves, and such object was known and acquiesced in by the solicitor or agent of the vendor, the vendor himself not being cognisant of such purpose (see *Holyland v. Bremner*, 1846, 1 Lut. 381).

Moreover, a fraudulent conveyance made for the mere purpose of conferring a vote is not absolutely avoided by the statutes, but is void only to the extent of preventing the right of voting from being acquired; it is, however, valid and effectual as between the parties to pass the interest (*Phillpotts v. Phillpotts*, 1850, 10 C. B. 85).

Protection against the creation of fraudulent and occasional votes is at the present time also afforded by the modern statutory provisions requiring the registration of voters, the actual possession of the freehold, or receipt of the rents and profits for six months previous to registration (see Representation of the People Act, 1832, 2 & 3 Will. IV. c. 45, s. 26; Parliamentary and Municipal Registration Act, 1878, 41 & 42 Vict. c. 26, s. 7; Registration Act, 1885, 48 & 49 Vict. c. 15, s. 12), and the actual occupation of freeholds for life under the yearly value of £5 (see Representation of the People Act, 1832, s. 18, and Representation of the People Act, 1867, 30 & 31 Vict. c. 102, s. 5; see also *Trenfield v. Lowe*, 1869, L. R. 4 C. P. 454; *Druitt v. The Overseers of Christchurch*, 1883, 12 Q. B. D. 365). Recent legislation tending to check the creation of faggot votes is also contained in the Representation of the People Act, 1884, 48 & 49 Vict. c. 3, by which it is provided that no one is to be entitled to be registered as a voter in respect of the ownership of any rent-charge, except the owner of the whole of the tithe rent-charge of a benefice to which an apportionment of tithe rent-charge has been made in respect of any portion of tithes (*ibid.* s. 4 (1)). And where two or more persons are owners, either as joint-tenants or as tenants in common of an estate in any land or tenements, one only of them, but not more than one, is, if his interest is sufficient to confer on him a qualification as a voter in respect of the ownership of such estate, entitled to be registered as a voter, provided that where such owners have derived their interest by descent, succession, marriage, marriage settlement, or will, or where they occupy the land or tenement, and are *bonâ fide* engaged as partners carrying on trade or business thereon, each of them whose interest is sufficient to confer on him a qualification as a voter is entitled to be registered and to vote, and the value of the interest of each such owner, where not otherwise legally defined, is to be ascertained by the division of the total value of the land or tenement equally among the whole of such owners (*ibid.* s. 4 (2)); see also as to joint-tenancies created in order to confer votes, *Gallagher v. Campbell*, 1892, Lawson, *Notes of Decisions in Registration Cases*, p. 229; *Torish v. Stevenson*, 1893, *ibid.* 230; *Mooney v. Chambers*, [1894] 2 Ir. Rep. 374). The rights of persons registered as voters at the time of the passing of the Act are not, however,

affected (Representation of the People Act, 1884, s. 10; see also *M'Intyre v. Black* (*Keenan's case*), 1888, Lawson, *Notes of Decisions in Registration Cases*, p. 300).

See also FRANCHISE (ELECTORAL); REGISTRATION.

Failure of Issue.—See DIE WITHOUT ISSUE, and *ante*, p. 232.

Fair Comment.—See DEFAMATION.

Fair Price.—See LANDLORD AND TENANT, *Agricultural Holdings*.

Fairs.—See MARKETS AND FAIRS.

Fair Valuation.—See VENDOR AND PURCHASER.

Fairway.—The “fairway” of a river or channel means “the clear passage way by water, or the open navigable passage used by vessels proceeding up and down a river or channel” (Bruce, J., *The Blue Bell*, [1895] Prob. 242, a case of collision under the Thames Navigation By-laws, 1880). See COLLISIONS AT SEA, vol. iii. p. 106.

Falkland Islands.—A group of islands in the South Atlantic, of which the British Government took possession in 1833, for the protection of the whale fishery. In 1842 a civil administration was formed. The Governor is assisted by a Legislative Council, which includes two unofficial members, appointed by the Crown. There is a judge and magistrate, from whom an appeal lies to the Governor in Council; there is a final appeal to the Queen in Council. See the Laws and Ordinances of the Falkland Islands. South Georgia, a group of uninhabited islands, is regarded as a dependency of the Falklands. As to conditions of appeal, see PRIVY COUNCIL.

False—

Imprisonment consists in the restraining of the liberty of any person against his will without the authority of law. The restraint to constitute imprisonment must be substantially total for some period, however short. It is immaterial whether the restraint is in a prison or within walls or in an open place; but merely restraining a man from going in a particular direction is not imprisonment, if there are other directions in which he is free to go (*Bird v. Jones*, 1845, 7 Q. B. 742). False imprisonment usually but not necessarily (*Emmett v. Lyne*, 1805, 1 Bos. & P. N. R. 255) involves at least a technical assault or battery, but it can be effected without actually touching the person imprisoned, *e.g.* by show of force or of authority or of determination to use force (*Gruinger v. Hill*, 1838, 4 Bing. N. C. 212; *Warner v. Ruddiford*, 1858, 4 C. B. N. S. 180, 204).

A person wrongfully imprisoned has remedies, both by action and by indictment, and by the writ of *habeas corpus*. Both in actions and indict-

ments it was formerly usual to describe the imprisonment as effected *vi et armis* and against the peace, but this form of pleading was rendered unnecessary by the Criminal Justice Act, 1851 (14 & 15 Vict. c. 100, s. 24), and the Common Law Procedure Acts.

1. The cause of action or indictment and the defences are substantially the same, *i.e.* a person charged with false imprisonment must either prove that the imprisonment was not his act or was justified. In this respect the civil action being an action for TRESPASS TO THE PERSON differs from the action of MALICIOUS PROSECUTION, an action on the case in the nature of "judicial slander," in the fact that in false imprisonment when once the imprisonment is established the burden of proof is thrown on the defence, and the innocence of the defendant's intention is immaterial, whereas in the other action the plaintiff must not only prove the fact and termination of the prosecution, but also that it was both unreasonable and malicious (*Tarlton v. Fisher*, 1781, 2 Doug. 674). All the persons concerned in an illegal arrest are liable as joint tort-feasors, *i.e.* the judge who authorises it, the officer who effects it, and the persons at whose instance it is effected where they have personally directed that it should be made (*Hopkins v. Crowe*, 1836, 4 Ad. & E. 774). But where a person merely applies to a judicial officer for process, and it is issued and executed, the remedy against him (where the process was issued with jurisdiction) is not in trespass, but for maliciously and unreasonably setting the law in motion (*Carratt v. Morley*, 1841, 1 Q. B. 18).

Judicial officers are liable for false imprisonment only where they have acted absolutely without jurisdiction and actual detention has taken place in consequence (*Bushell's case*, 1670, 6 How. St. Tr. 999; *Hamond v. Howell*, 1675, 1 Mod. Rep. 184; 2 Mod. Rep. 218). See EXCESS OF JURISDICTION. Judges or justices of inferior Courts whether of record or not, incur a larger liability in these matters than those of the superior Courts, being liable if they act illegally, even if their acts were done in good faith and without malice (*Hill v. Bateman*, 1725, 2 Stra. 710; *Houlden v. Smith*, 1850, 14 Q. B. 841; *Jones v. German*, [1896] 2 Q. B. 418; [1897] 1 Q. B. 374).

The first question, common to the civil and criminal proceedings, is whether the imprisonment was the act of the defendant. It is not necessary that he should himself actually have applied the restraint; but to be liable he must have either directed or authorised or adopted the proceedings which led to the imprisonment. To give a man into custody on a criminal charge is imprisonment; but it is not so, merely to complain to a constable or justice, if the judicial or executive officer thereupon takes independent action; nor is it so where the complainant merely signs the charge-sheet at the request of a police officer and not as complainant (*Grinham v. Willey*, 1859, 4 H. & N. 496; *Austin v. Dowling*, 1870, L. R. 5 C. P. 534).

An employer is not liable for false imprisonment by his servants or agents, unless it can be shown that the servants had express or implied authority to make or order the arrest (*Abrahams v. Deakin*, [1891] 1 Q. B. 516).

Nor is a complainant liable for any imprisonment consequent on the act of a magistrate, such as arrest on a legal warrant or detention whether reasonably or unreasonably on remand (*Austin v. Dowling*, 1870, L. R. 5 C. P. 534). The second question is with reference to justification. From this point of view there are two classes of cases—

(a) Arrest under colour of the authority of a judicial officer, which can be justified, unless the judicial officer obviously had no jurisdiction or the writ or warrant issued by him was absolutely void on the face of it, or, if

only voidable, was irregularly or deceitfully procured by the acts of the persons instituting the proceeding in which the arrest was made;

(b) Arrest without the authority of a judicial officer, which can be justified only in the case of an actual or supposed breach of the criminal law by the person arrested.

(a) There are a number of decisions in which the person obtaining a warrant or writ of arrest, or his solicitor, have been held liable for false imprisonment. They are all instances of warrants, etc., either issued wholly without jurisdiction, or obtained by misconduct and misrepresentation by the party or his attorney, and in the latter case, unless the process is absolutely void, until it is set aside, the remedy seems to be not false imprisonment but malicious prosecution or arrest (*Codrington v. Lloyd*, 1840, 8 Ad. & E. 449; *Williams v. Smith*, 1863, 14 C. B. N. S. 596). Where it is set aside as a matter of favour, no action will lie (*Smith v. Sydney*, 1870, L. R. 5 Q. B. 203).

The rule appears to be that when the process is absolutely void on the face of it, all persons concerned in its issue or execution are liable for any imprisonment under it; but that where it is only voidable the ministerial officers who execute it are not liable; but the judge by whom, and the parties on whose application, it was issued are liable (*Bigelow on Torts*, 150 n; *Shergold v. Holloway*, 1733, 2 Stra. 1002; *Tarlton v. Fisher*, 1781, 2 Doug. 671).

Further, if the wrong person is arrested under a warrant, the warrant will not justify his arrest, or his receipt by a gaoler, unless the person arrested misled the warrant officer as to his identity (*Aaron v. Alexander*, 1811, 3 Camp. 35; 13 R. R. 742; *Duntson v. Paterson*, 1847, 2 C. B. N. S. 495; *Jarmain v. Hooper*, 1844, 6 Man. & G. 827). The same considerations apply where if having effected an arrest the officer does not take his prisoner with all reasonable speed before a magistrate (*Wright v. Court*, 1825, 4 Barn. & Cress. 596), or detains him after the warrant or authority for his detention has expired. This is specially applicable in the case of a gaoler to whom a prisoner is delivered for safe custody in execution of sentence (*Migotti v. Colvill*, 1879, 4 C. P. D. 233). If he detains his prisoner beyond the time limited by or deducible from the warrant, he is liable for false imprisonment (*Moone v. Rose*, 1869, L. R. 4 Q. B. 486; *Henderson v. Preston*, 1888, 21 Q. B. D. 362). But where the terms of the writ or warrant are distinct, and not obviously illegal, the officer must obey them, and is not liable for false imprisonment if the imprisonment ordered is in excess of the law (*Countess of Rutland's case*, 1605, 6 Co. Rep. 54 a; *Andrews v. Marris*, 1839, 1 Q. B. 3; *Greaves v. Keene*, 1879, 4 Ex. D. 73). A distinction has been drawn between orders of a superior Court and of an inferior Court, those of the former being presumably within their jurisdiction, those of the latter requiring examination to see whether their limited authority has been exceeded (*Gosselt v. Howard*, 1847, 10 Q. B. 411, 453).

(b) The cases in which arrest can be made by statutory authority without warrant, oral or written, of a judicial officer, are enumerated under ARREST. For the present purpose it is enough to say that at common law the imprisonment by any person may be justified—

(1) In the case of felony, if a felony has been actually committed, and there is reasonable and probable cause for believing the person arrested to be the felon;

(2) In the case of misdemeanour, where a real and not a merely technical breach of the public peace is being or has been committed, and the arrest

is immediate (1 Stephen, *Hist. Cr. Law*, 193-200; *Bowditch v. Balchin*, 1851, 5 Ex. Rep. 378; *Baynes v. Brewster*, 1842, 2 Q. B. 375; *Timothy v. Simpson*, 1835, 1 C. M. & R. 757). Imprisonment by a constable can be justified at common law where he has reasonable cause to suspect that a felony has been committed, and that the person arrested committed it.

The burden of proof that the constable or private person had reasonable and probable grounds for his belief at the time of the arrest, rests upon the defence. Under the present practice it is for the jury to find the truth as to any facts in controversy, and for the judge to say whether the facts constituted a reasonable ground for the arrest (*Lister v. Perryman*, 1870, L. R. 4 H. L. 521). This rule has been subject of much controversy and criticism, and will be further discussed under MALICIOUS PROSECUTION.

It is not necessary to enable the person imprisoned to sue for false imprisonment that the imprisonment or any consequent legal proceedings should have terminated. The prisoner, if his arrest is illegal, is entitled to terminate his imprisonment by application for a writ of HABEAS CORPUS. The old remedy by writ *de homine replegiando* has fallen into disuse. Where the imprisonment was in intended execution of a statute, any action in respect of it appears to be subject to the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which have got rid of the old rules as to NOTICE OF ACTION and pleading the GENERAL ISSUE.

2. Wrongful imprisonment is also an indictable misdemeanour at common law, whether it is or is not coupled with assault or battery. It is punishable by fine and (or) imprisonment without hard labour, at the discretion of the Court. The offence is triable at Quarter Sessions. In an indictment for the offence it is usual to charge also an assault and battery (see Archbold, *Cr. Pl.*, 21st ed., 796). Prosecutions for false imprisonment are unusual, unless there have been circumstances of oppression, extortion, or other special aggravation.

Imprisonment on a British ship under the orders or at the request of a Foreign Government, and outside its territory, is a misdemeanour against English law (*R. v. Lesley*, 1859, 29 L. J. M. C. 97).

There is said to be a common law misdemeanour described as kidnapping (*R. v. Gray*, 1682, 9 How. St. Tr. 127; 3 Russell on *Crimes*, 6th ed., 269), but its incidents do not differ from those of wrongful imprisonment, except that it is said to involve taking the prisoner out of the realm. It is a misdemeanour under sec. 11 of the Habeas Corpus Act, 1679 (31 Chas. II. c. 2), knowingly to frame, contrive, write, seal, or countersign any warrant for the commitment, detainer, or transportation of any subject resident in England, Wales, or Berwick, as a prisoner to Scotland, Ireland, the Channel Islands, or any place beyond the seas, or so to commit, detain, or transport any person. The punishment is the penalties of *præmunire*, i.e. forfeiture of lands, tenements, goods, and chattels (not affected by the Forfeitures Act, 1870), and imprisonment for life, and to be put outside the Queen's protection (see Stephen, *Dig. Crim. Law*, 5th ed., p. 89). This enactment is directed against kidnapping (*Designy's case*, 1682, 2 Raym. (Sir T.) 474) and transportation for misdemeanours, or without trial and conviction, and did not affect transportation under conditional pardon, as practised in the seventeenth century (see Act, ss. 12, 13), nor the conveyance to other parts of the empire of fugitives from the justice of these parts (s. 16), and it was overridden by the subsequent Transportation and Penal Servitude Acts. (See EXTRADITION; FUGITIVE OFFENDER; PENAL SERVITUDE; and see 6 *Law Quarterly Review*, 1890, p. 388.)

For other forms of imprisonment, see ABDUCTION.

[*Authorities*.—2 *Co. Inst.* 482, 589; *Viner, Abr.* "Imprisonment"; *Com. Dig.* tit. "Imprisonment"; *Hawk.*, P. C., bk. i. c. 60; *Addison on Torts*, 6th ed., 146; *Pollock on Torts*, 5th ed., 211; *Bigelow on Torts*, Engl. ed., 130; *Stephen on Malicious Prosecution*; *Clerk and Lindsell on Torts*, 2nd ed.; *Archbold, Cr. Pl.*, 21st ed., 796; 3 *Russell on Crimes*, 6th ed., 269, 309.]

Judgment.—1. At common law the mode of challenging judgments given in the common law County Court or a Court baron or other Courts not of record was by writ of false judgment. Originally the writ was returnable in the Court of the immediate feudal superior of a baron in whose Court the false judgment had been given. By the Statute of Marlborough, 52 Hen. III. c. 3, exclusive cognisance was given to the king's Courts, and the writ became returnable in the Common Bench. The proceedings in the lower Courts were certified by the suitors, subject to a mode of trying errors assigned on their certificate, which is prescribed by 1 Edw. III. st. 1, c. 4. The whole process is now obsolete, but is dealt with fully in *Vin. Abr.* tit. "False Judgment" (see CERTIORARI).

2. False judgments in Courts of record, even a Court of piepowder, were challenged by writ of error, now abolished as to civil proceedings (see ERROR, WRIT OF; APPEAL; CERTIORARI).

Latin.—Indictments were drawn in Latin in England till 4 Geo. II. c. 26, and in Wales till 6 Geo. II. c. 14, s. 5. If the words used were insensible in Latin and not known in English law as a term of art, the indictment could be quashed (*Long's case*, 1603, 5 Co. Rep. 121). The only relic of this obsolete practice is the (virtually but not formally repealed) provision in the Treason Act, 1695 (7 & 8 Will. III. c. 3, s. 9), that an indictment is not to be quashed for miswriting, misspelling, or false or improper Latin, unless excepted to before evidence is given.

Measures.—See WEIGHTS AND MEASURES.

Personation.—See PERSONATION.

Pretences.—The common law remedies for wrongs effected by fraud are (1) by indictment for a common law CHEAT; (2) by action for DECEIT. The definition for CHEATING at common law having been found insufficient (see CHEAT), the statutory offence of obtaining money by false pretences was created partially and tentatively by 33 Hen. VIII. c. 1, and substantially in its present form in 1756 (30 Geo. II. c. 24). It is now constituted by secs. 88-90 of the Larceny Act, 1861 (see *Archbold, Cr. Pl.*, 21st ed., 545). The reason for creating the offence was that the offence of larceny did not cover cases where a man was induced by fraud to part with the property as well as the possession of a chattel (*Archbold, Cr. Pl.*, 21st ed., 394).

1. It is a misdemeanour (a) to obtain from any person by any false pretence, with intent to defraud, any property the subject of larceny, *i.e.* any chattel, money, or valuable security, but not a dog (*R. v. Robinson*, 1859, Bell C. C. 34) (s. 88); (b) by any false pretence to cause or procure, with intent to defraud, the payment of any money, or the delivery of any chattel or valuable security, to any person for the use or benefit of the person making the false pretence, or of any other person (s. 89). Persons are punishable as for obtaining property by false pretences who win to themselves or others money or any valuable thing by

any fraud or unlawful device or ill-practice in playing at any game, or in betting on the players, or on the event of any game, sport, or pastime (8 & 9 Vict. c. 109, s. 171; and see *R. v. Hudson*, 1860, 29 L. J. M. C. 145).

2. It is a misdemeanour, fraudulently, and by any false pretence, and with intent to injure or defraud any other person, to cause or induce any other person (1) to execute, make, accept, indorse, or destroy the whole or any part of a valuable security; or (2) to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that it may be afterwards converted into, or dealt with as, a valuable security (s. 90). This offence was created in consequence of the decision in *R. v. Danger*, 1856, 26 L. J. M. C. 185.

3. It is also a misdemeanour to receive any property obtained by means of the offences above stated, with knowledge that it was obtained by such offences (s. 95).

The punishment for offences 1. and 2. is penal servitude from three to five years, or imprisonment with or without hard labour for not over two years, with or without fine (24 & 25 Vict. c. 96, ss. 88, 90; 54 & 55 Vict. c. 69, s. 1); and the punishment for offence 3. is penal servitude from three to fourteen years, or imprisonment and (or) fine as in cases 1. and 2. (24 & 25 Vict. c. 96, s. 95; 54 & 55 Vict. c. 69, s. 1). The Court may in the alternative require the offender to enter into his own recognisances, with or without sureties, to keep the peace or be of good behaviour, or both; or in default of finding sureties, imprison him without hard labour for not over one year (24 & 25 Vict. c. 96, s. 117).

Where the offence is a first offence, the Court may alternatively proceed under the First Offenders Act, 1887 (50 & 51 Vict. c. 25). See FIRST OFFENDERS. Where the offence is committed after a previous conviction for the same offence or felony, the Court may, in addition to any other lawful sentence, put the offender under police supervision for not over seven years after the expiration of his sentence (34 & 35 Vict. c. 112, ss. 8, 20).

4. Under the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 13), it is a misdemeanour punishable by imprisonment with or without hard labour for any period not exceeding twelve months, for any person, whether a bankrupt or not, to obtain credit by false pretences or any other fraud, when incurring a debt or any other liability (*R. v. Rowlands*, 1882, 8 Q. B. D. 530; and see FRAUDULENT Debtors).

5. Persons who conspire, incite, or attempt to commit, or who aid or abet, counsel or procure the commission of any of the above-named offences, are liable to indictment. See ABETTOR; ATTEMPT; CONSPIRACY.

6. There are numerous statutory offences of a fraudulent character which closely correspond to false pretences. See Russell on *Crimes*, 6th ed., vol. ii. p. 553; and ACCOUNTS, FALSIFICATION OF; FORGERY.

7. As to procuring illicit carnal intercourse by false pretences, see RAPE.

A very considerable amount of case-law exists as to the scope and effect of the provisions of secs. 88-90 of the Larceny Act, 1861, which is collected in Archbold, *Cr. Pl.*, 21st ed., 542-566; and Russell on *Crimes*, 6th ed., vol. ii. It may be thus briefly summarised. A pretence to be within the statute may be by verbal or written statements (*R. v. Cooper*, 1876, 2 Q. B. D. 510), or by conduct (*R. v. Barnard*, 1837, 7 Car. & P. 784), but must amount to an allegation or suggestion that some fact exists or has existed, and must be not a promise (however dishonest) as to some future event or conduct, nor mere commendation or appreciation of wares for sale,

i.e. puffing (*R. v. Ardley*, 1870, L. R. 1 C. C. R. 301; *R. v. Foster*, 1876, 2 Q. B. D. 301). Thus giving a cheque known to be worthless for the price of goods is obtaining the goods by false pretences. But in the case of the use of cheques or bank notes to prove that the pretence is false it is necessary to show that the accused knew it to be absolutely valueless, or had no reason to believe that it would be honoured on presentation (*R. v. Hazelton*, 1874, L. R. 2 C. C. R. 134). The cases, of which the most extreme is *R. v. Gordon*, 1888, 23 Q. B. D. 354, draw almost invisibly fine distinctions between false promises and false statements. It was the practice to convict persons for obtaining food by false pretences who dine at a restaurant and do not pay, but this practice was difficult to justify; and see now *R. v. Jones*, 1897, W. N. 167.

The "obtaining" by false pretences does not include detaining goods otherwise obtained, but means acquiring with intent to deprive the owner permanently and entirely of the goods, whether the goods are or are not acquired under a contract (*R. v. Kilham*, 1870, L. R. 1 C. C. R. 261). Consequently a loan of money can, but a loan of chattels cannot, be obtained by false pretences. It is not necessary that the property obtained should exist at the date of the false pretence if it is made or acquired and parted with in reliance on it (*R. v. Martin*, 1867, L. R. 1 C. C. R. 56).

It must be shown that the goods were parted with under belief in the pretences, however foolish such belief may be, and however easy it was for the person cheated to make inquiry as to the truth of the pretence (*R. v. Mills*, 1857, Dears. & B. C. C. 285). Where the property was not parted with from belief in the pretence, the pretender is indictable for the attempt to obtain (*R. v. Hensler*, 1870, 11 Cox C. C. 570) the property, or can be convicted of the attempt on an indictment for the completed offence (*R. v. Rorback*, 1856, 25 L. J. M. C. 101 (14 & 15 Vict. c. 100, s. 9)).

The offence is committed in the case of a pretence transmitted by post from one county or country to another, both where the letter is posted and where it is received (*R. v. Holmes*, 1883, 12 Q. B. D. 23; *R. v. Nillins*, 1884, 53 L. J. M. C. 157). The latter case has been questioned as insufficiently dealing with the difference between local venue and territorial jurisdiction, and in addition to which, see *Companhia de Moçambique v. British S. Africa Co.*, [1893] App. Cas. 602. The rules as to venue in larceny cases do not apply to false pretences (*R. v. Stanbury*, 1861, 31 L. J. M. C. 88; *R. v. Leach*, 1855, 25 L. J. M. C. 77).

The distinction between false pretences, forgery, and larceny by a trick is in certain cases very fine. A person who deliberately utters a forged document falsely pretends its genuineness, and the difference between false pretences and larceny rests on the answer to the question whether the person cheated did or did not mean to part with the property, as well as with the possession of the article in question (*R. v. Thompson*, 1862, 32 L. J. M. C. 57; *R. v. Cooke*, 1871, L. R. 1 C. C. R. 295; *R. v. Buckmaster*, 1887, 20 Q. B. D. 182; *R. v. Russett*, [1892] 2 Q. B. 312; *R. v. King*, [1897] 1 Q. B. 214); and see LARCENY.

The difficulty created by the fineness of the distinction is usually obviated by indicting for false pretences and relying on the rule under sec. 88 of the Larceny Act, 1861,—that a person is not entitled to be acquitted of the misdemeanour if his offence amounted in law to larceny. This provision merely repeats with small variation the general rule under 14 & 15 Vict. c. 100, s. 12; but there is no mode of convicting for false pretences where the indictment is for larceny.

Procedure—Trial.—All the offences referred to under this head are triable

at Quarter Sessions even after a previous conviction (5 & 6 Vict. c. 38, s. 1), and none are triable summarily. All the principal offences and conspiracies are subject to the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17; 32 & 33 Vict. c. 62, s. 18), but attempts to commit them are not (*R. v. Burton*, 1875, 13 Cox C. C. 71).

Indictments for obtaining property by false pretences must set out with particularity, and falsify, the actual pretence used, and state the person to whom the pretence was made, and from whom the property was obtained (*R. v. Sowerby*, [1894] 2 Q. B. 173). If this is not done, the indictment can be quashed; but the defect will be treated as cured if not challenged before verdict (*R. v. Goldsmith*, 1873, L. R. 2 C. C. R. 74). As to the proper mode of averring a false pretence by advertisement to the public, see *R. v. Silverlock*, [1894] 2 Q. B. 766.

Where the charge is of obtaining money or bank notes it is sustained by proof of obtaining any piece of money or note, even if given for the purpose of changing it and returning part of the value (14 & 15 Vict. c. 100, s. 18).

Indictments for conspiracy to obtain goods by false pretences and for unlawfully receiving goods obtained by false pretences need not set out the pretences (*R. v. Gill*, 1818, 2 Barn. & Ald. 204; *Taylor v. R.*, [1895] 1 Q. B. 25). The intent to defraud must be averred (*R. v. James*, 1871, 12 Cox C. C. 127), but may be charged and proved generally without reference to any particular person, and it is not necessary to state or prove to whom the property obtained belonged (24 & 25 Vict. c. 96, s. 88).

Any number of counts for obtaining different sets of goods within the same jurisdiction may be joined in one indictment, subject to compliance with the Vexatious Indictments Act, 1859, and to the power of the Court to interfere if the right is used in a manner oppressive to the accused (*R. v. King*, [1897] 1 Q. B. 214). And even where such charges are not included in the indictment they may be given in evidence to show guilty knowledge or intent on the part of the defendant (*R. v. Francis*, 1873, L. R. 2 C. C. R. 178; *Makins v. A.-G. of New South Wales*, [1894] App. Cas. 57).

A person who parts with goods on the faith of a letter containing alleged false pretences may be asked what opinion he formed on receipt of the letter (*R. v. King*, [1897] 1 Q. B. 214).

The provisions of sec. 100 of the Larceny Act, 1861, as to the restitution on conviction of goods stolen, etc., do not now apply to goods obtained by false pretences or any fraud not amounting to larceny (56 & 57 Vict. c. 71, s. 23).

[*Authorities*.—Archbold, *Cr. Pl.*, 21st ed., 542; Steph. *Dig. Crim. Law*, 5th ed., 297; Russell on *Crimes*, 6th ed., vol. ii. pp. 437, 467–551; and cp. Mayne, *Ind. Crim. Law*, 1896, p. 711.]

Prophecies were punishable under an Act of 1562 (5 Eliz. c. 15), which was repealed in 1863 (26 & 27 Vict. c. 126). See FORTUNE TELLING.

Representation.—See COMPANY, *Deceit*; and FRAUD.

Return.—Where a writ of execution has been issued and the sheriff makes a false return to it, as, for instance, where a sheriff returns *nulla bona* to a writ of *fi. fa.*, and the judgment debtor was at the time of the execution possessed of goods which the sheriff might and ought to have seized, the person issuing the writ has, if he can prove damage, a right of

action against the sheriff for the false return (*Wylie v. Birch*, 1843, 4 Q. B. 566, 577; *Stimson v. Farnham*, 1871, L. R. 7 Q. B. 175, 180). But such action will not lie unless actual damage has been caused to the plaintiff (*ibid.*). For other instances of false returns, see Mather on *Sheriff Law*, p. 91. See further, EXECUTION; SHERIFF.

Signals.—It is a felony for any person to unlawfully mark, alter, or remove any light or signal, or to unlawfully exhibit any false light or signal with intent to bring any ship, vessel, or boat into, or to unlawfully and maliciously do anything tending to, the immediate loss or destruction of any ship, vessel, or boat, punishable by penal servitude for life, or for any term not less than five years, or with imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping (1861, 24 & 25 Vict. c. 97, s. 47; 1864, 27 & 28 Vict. c. 47, s. 2). In addition to any such punishment the offender may be required to enter into recognisances and find sureties for keeping the peace (24 & 25 Vict. c. 97, s. 73). This offence is not triable at Quarter Sessions (1842, 5 & 6 Vict. c. 38, s. 1). A master of a vessel who uses or displays, or causes or permits any person under his authority to display, any of the regular signals of distress, except in the case of a vessel being in distress, is liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of that signal having been supposed to be a signal of distress, which compensation may without prejudice to any other remedy be recovered in the same manner in which salvage is recoverable (M. S. A. s. 434). The owner or master of an ordinary boat, on board of which there is not a licensed pilot or a master or mate holding a pilotage certificate, displaying a pilot flag, or a flag so nearly resembling a pilot flag as to be likely to deceive, is liable, unless he can disprove an intention to deceive, to a fine not exceeding £50 (*ibid.* s. 614). And the master of a vessel using or displaying, or allowing to be used or displayed, a pilot signal for any other purpose than that of summoning a pilot, is liable to a fine not exceeding £20 (*ibid.* s. 615). Shipowners desiring to use rockets, lights, or other similar signals for the purpose of a private code must register them with the Board of Trade, which, if it allows them, must give public notice of their being registered so as to prevent them being mistaken for distress or pilot signals. If they are likely to be so mistaken, the Board may refuse to register them (*ibid.* s. 733).

Trade Description.—See MERCHANDISE MARKS.

Verdict.—See ATTAINT.

Weights.—See WEIGHTS AND MEASURES.

Falsifying—

Accounts.—See ACCOUNTS, FALSIFICATION OF.

Judgments.—See FORGERY; JUDGMENT.

News.—1. A conspiracy to spread false news with the object of enhancing or depressing the price of any commodity or merchandise, or to raise or depress the price of stocks, is an indictable misdemeanour (7 & 8

Vict. c. 24, s. 4; *R. v. Waddington*, 1800, 1 East, 143; *R. v. De Berenger*, 1814, 3 M. & S. 62; *R. v. Aspinall*, 1876, 1 Q. B. D. 730; 2 Q. B. D. 48), and any agreement with this object is illegal and void (*Scott v. Brown*, [1892] 2 Q. B. 724).

2. It was a misdemeanour punishable by fine or imprisonment, and subject for civil proceedings, to spread false news, to make discord between the sovereign and the nobility, or concerning any great men of the realm (3 Edw. I. (Stat. Westm. 1), c. 34; 2 Rich. II. st. 1, c. 5; 12 Rich. II. c. 11). These enactments, known as the statutes *de scandalis magnatum*, were repealed in 1887 (50 & 51 Vict. c. 59; see Odgers on *Libel*, 2nd ed., 134; 3rd ed., 477). There is recorded a prosecution in 1214 for treason against a man alleged to have spread a false rumour as to the king's death (1 Seld. Soc. Publ. p. 69, pl. 115).

Pedigree.—See PEDIGREE.

Records.—See FORGERY; RECORDS.

Family Arrangement.—Where an arrangement is entered into to save the honour or preserve the property (*Williams v. Williams*, 1866, L. R. 2 Ch. at p. 304) of a family, the Court will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family (per Lord Hardwicke in *Stapilton v. Stapilton*, 1739, 1 Atk. 2), even though it rests upon grounds which might not have been considered satisfactory between strangers (per Sugden, L.C., in *Westby v. Westby*, 1842, 2 Dr. & War. 502), and especially in cases of disputed legitimacy (*ibid.*).

No agreement need have been arrived at in words, if one can be implied from a long course of dealing with the family property, and this may be done even though an actual dispute has never arisen (*Williams v. Williams*, 1866, L. R. 2 Ch. 294).

A very slight *consideration* will be sufficient to support an agreement by way of family arrangement. In order to set such an agreement aside on the ground of inadequacy of consideration, the inadequacy must be so gross as to involve the conclusion that the complainant either did not understand what he was about, or was the victim of some imposition (per Lord Westbury in *Tennent v. Tennents*, 1870, L. R. 2 H. L. Sc. App. 6). In most cases the consideration is the compromise of a claim. Even if the claim is bad, for instance, so unsustainable as a claim depending on the validity of a marriage with a deceased wife's sister (*Westby v. Westby*, *supra*), this consideration is sufficient, provided the claim is a real one, and is made in good faith (*Neale v. Neale*, 1837, 1 Kee. 672; *Stewart v. Stewart*, 1838, 6 Cl. & Fin. 911; *Cook v. Wright*, 1861, 1 B. & S. 559).

A compromise or agreement entered into by some of the parties entitled on the footing that all should concur, is not binding unless all do concur (*Peto v. Peto*, 1849, 16 Sim. 590; *Bolitho v. Hillyar*, 1865, 34 Beav. 180; cp. *Taylor v. Cartwright*, 1872, L. R. 14 Eq. 167).

There must be *full disclosure* to the other parties of all material circumstances known to each party at the time of the arrangement. In a family arrangement where near relatives—some having authority—contract with each other, a high and punctilious probity will be expected, and equity will interpose to do justice on very moderate indications of laxity; such contracts are *uberrimæ fidei* (per Lord Westbury in *Tennent v. Tennents*, *supra*; see CONTRACT, vol. iii. p. 345). Thus, where the legitimacy of an

elder brother was in question, an agreement made for a division of the property was set aside because the younger brother, knowing that a ceremony of marriage had taken place before the other's birth, had failed to communicate the information to him (*Gordon v. Gordon*, 1821, 3 Swan. 400; 19 R. R. 230). *A fortiori* if any material misrepresentation has been made, the agreement will be set aside (*Fane v. Fane*, 1875, L. R. 20 Eq. 698). The rule requiring disclosure is exceptional. In ordinary cases, where parties are independent, and are dealing "at arm's length" with each other, a mere non-disclosure does not vitiate the arrangement (see *Turner v. Green*, [1895] 2 Ch. 205).

Mistake.—A family arrangement will be supported "although the parties have greatly misunderstood their situation and mistaken their rights" (per Lord Eldon in *Gordon v. Gordon*, *supra*, 3 Swan. at p. 463), and in many of the cases cited above it had ultimately appeared that one party to the compromise had no real interest at all. But if an arrangement proceeds upon a common mistaken assumption as to a fact not intended to be affected by it, the arrangement may be set aside. Thus, where a claim for arrears of interest upon a portion was compromised by a deed, on it appearing that there was no title to the portion itself, the deed was set aside (*Lawton v. Campion*, 1854, 18 Beav. 87).

The mistake or ignorance of a party is not material, if he was represented by an agent who was sufficiently informed (*Stewart v. Stewart*, 1838, 6 Cl. & Fin. 911).

Rectification.—An agreement entered into in pursuance of a family arrangement may be rectified if it does not express the real agreement (*Ashurst v. Mill*, 1848, 7 Hare, 502), but not if the terms in question have been acted upon for a long time without dispute (*Bentley v. Mackay*, 1862, 31 Beav. 143).

An arrangement procured by *undue influence* will be set aside, e.g. if trustees of a will coerce one beneficiary to divide his share (*Ellis v. Barker*, 1871, L. R. 7 Ch. 104). But a transaction between father and son is not invalidated because the father has used his paternal influence to induce the son to agree, even if the son has had no independent advice, unless the father has secured for himself an unreasonable benefit. Even if he have, the transaction will be supported upon the terms of his abandoning it (see *Hoblyn v. Hoblyn*, 1889, 41 Ch. D. 200).

An arrangement made between father and son, with a trust for payment of the father's debts after his death, may be enforced by the creditors (*Priestley v. Ellis*, [1897] 1 Ch. 488).

[**Authorities.**—See White and Tudor's *Leading Cases*, notes to *Stapilton v. Stapilton*; and 12 *Ruling Cases*, p. 99.]

Family Mansion-house.—A house and 165 acres was held not to be sufficiently large to entitle it to be called a family mansion-house in the sense that there was anything in the shape of a *pretium affectionis* to cause the Court to refuse to consent to a sale under the Settled Estates Acts (*In re Spurway's Settled Estates*, 1878, 10 Ch. D. at p. 233, per Jessel, M. R.). Restrictions are put upon the sale or letting of the "principal mansion-house" (if any) on settled land by sec. 10 of the Settled Land Act, 1890. See SETTLED LAND ACTS.

Fancy Bread.—See FRENCH BREAD.

Farcy.—A disease of horses connected with GLANDERS (*q.v.*).

Fare.—See CAB (vol. ii. p. 321) and RAILWAYS.

Faro or Pharaoh.—A game with cards, in which the players bet on the order in which certain cards will appear when taken singly from the top of the pack (Murray, *Dict. Eng. Lang., s.v.*). It was declared unlawful by 12 Geo. II. c. 28, s. 2. See GAMING; GAMING HOUSE.

Farrier.—A farrier is defined by Johnson as (1) "a shoer of horses," and (2) "one who professes the medicine of horses." According to the same authority, farriery "is the practice of trimming the feet and curing the diseases of horses." But he adds that "the farriers of modern days have dissolved this partnership, applying farriery merely to shoeing horses, and the more stately term of veterinary art to physicking or healing the sick animal." This article is therefore confined to the legal rights and liabilities of a farrier as a shoer of horses. As to the legal position of a professor of the veterinary art, see VETERINARY SURGEON.

Where a man takes upon himself a public employment he is bound to serve the public as far as his employment goes, or an action lies against him for refusing. A farrier who arbitrarily refuses to shoe a horse is therefore liable to an action for the damage resulting from such refusal; but he may refuse to shoe a horse which is brought to him to be shod at an irregular hour (14 Hen. VI. c. 18; *Lane v. Cotton*, 1700, 1 Salk. 18).

A farrier is liable to an action if from lack of reasonable skill or due care he lames a horse in shoeing it, and the action is founded on the implied contract that every workman undertaking any work will perform it properly (2 Chit. *Pl.*, 7th ed., 262; *R. v. Kilderby*, 1669, 1 Saund. 312 n. 2; Nat. Brev. 94 d). If he performs the operation of shoeing unskilfully and improperly, he is liable for any injury which may result from such unskilfulness. For it is a rule of law that a person employed for any purpose must bring to the subject-matter a reasonable skill and fitness, and he must exercise that reasonable skill and fitness with due and proper care. If he be deficient in the requisite skilfulness, and in consequence of that the operation is performed in a bad and bungling manner, or if, having the requisite skilfulness, he fails to bring it to act, he is liable for any injury which may result (*Collins v. Rodway*, 1845, 19 Vet. Entr. 102, per Pollock, C.B.; Oliphant on *Horses*, 5th ed., 215). But an operation of this sort cannot be considered in the light of an insurance, as a farrier is no more an insurer against injury resulting from the operation he undertakes to perform than a surgeon or a barber. He is not necessarily liable because he pricks a horse in shoeing it, for it may be that the foot of the horse is in such a state as to render it difficult or hardly possible to perform the operation without something of the sort taking place. Wherever this is the case, or there is any other circumstance likely to give rise to any peculiar difficulty, information should be given to the farrier, in order that he may be made acquainted with the risk that he is exposing himself to (*ibid.*).

An action may be maintained against a farrier for a breach of duty arising out of a contract with a third person. Thus Coke, C.J., puts this case: "If a master sends his servant to pay money for him upon the penalty of a bond, and on his way a smith in shoeing doth prick his horse, and so

by reason of this the money is not paid; this being the servant's horse, he shall have an action upon the case for pricking of his horse; and the master also shall have his action upon the case for the special wrong which he hath sustained by the non-payment of his money occasioned by this" (*Eccard v. Hopkins*, H. T. 12 Jac. 1; 2 Bulst. 332).

Where a horse has been injured in shoeing from the negligence of a farrier's servant, the master is liable (1 Black. Com. 431; *Randleson v. Murray*, 1835, 8 Ad. & E. 109); but not if the wrong be wilful, as if the servant maliciously drives a nail into the horse's foot in order to lame him (*Jones v. Hart*, 1698, 2 Salk. 440).

If a farrier intrusted with a horse to be shod lends him to another, and the second pricks him in shoeing, an action lies against the first, or the second, in the option of the owner (12 Edw. IV. c. 13).

It is no answer to an action for negligence in shoeing a horse, for a farrier to say that the owner of the horse insisted on having the work done at an unreasonable hour. For in such case the farrier is bound to refuse to do the work, or, if he does it, to distinctly declare that he will not be responsible for the consequences (*Collins v. Rodray*, *ubi supra*).

Under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54 (1), every person who, within the limits of the Metropolitan Police District, shall in any thoroughfare or public place, to the annoyance of the inhabitants or passengers, shoe, bleed, or farry any horse or animal, except in cases of accident, or clean, dress, exercise, or break any horse or animal, is liable to a penalty not exceeding forty shillings. And by sec. 28 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the like penalty is imposed upon every person who does any of these things, in any street, to the obstruction, annoyance, or danger of the residents—a prohibition which appears to be somewhat less extensive than that contained in the former Act.

A horse standing at a farrier's to be shod is exempt from distress, on the ground of public utility (*Francis v. Wyatt*, 1764, 3 Burr. 1502).

As a party has a right to go to a farrier's shop by the tacit permission of the law (*Lane v. Cotton*, 1700, 1 Salk. 18), an action does not lie against a farrier for refusing to deliver a horse which he has shod, unless the money due for the shoeing has been paid or tendered (Bac. Abr. "Trover" E.), because the farrier by whose skill the operation of shoeing is performed has a lien on the horse in respect of his charges; and such specific lien, being consistent with the principles of natural equity, is favoured by the law, which is construed liberally in cases of this nature (*Scarfe v. Morgan*, 1839, 4 Mee. & W. 280; *Chase v. Westmore*, 1840, 5 Mee. & W. 189; 17 R. R. 301).

But the horse can only be kept for work done at that particular time, for the lien does not extend to any previous account. When this point was decided, Lord Ellenborough said: "Growing liens are always to be looked at with jealousy, as they are encroachments on the common law. If they are encouraged in practice, the farrier will be claiming a lien upon a horse sent to him to be shod. It is not for the convenience of the public that these liens should be extended further than they are already established by law" (*Rushforth v. Hadfield*, 1806, 7 East, 229; 8 R. R. 520).

In one case a difficulty arose out of the circumstance that a living chattel might become expensive to the detainer, and would raise the question as to who was liable to feed it intermediately. But this difficulty was answered by referring to the analogous case of a distress kept in pound covert, where he who distrains is compellable to take reasonable care of the

chattel distrained, whether living or inanimate (*Scarfe v. Morgan*, *ubi supra*; see also *British Empire Shipping Co. v. Somerset*, 1861, 30 L. J. Q. B. 229 H. L.).

[*Authorities*.—See authorities cited at end of article HORSES.]

Fast Day.—See BILLS OF EXCHANGE; DAY; TIME; FEASTS.

Faults.—As to the phrase “with all faults,” see *Ward v. Hobbs*, 1878, 4 App. Cas. 13, where the earlier cases are noted, and Stroud, *Jud. Dict.*, s.v. “Faults.”

Faux (*crimen falsi*) is the nearest equivalent in French law to the English crime of forgery. It is dealt with by arts. 145–149 of the Code Pénal. Consideration of the offence under French or Belgian law is only material for the purposes of the Extradition Acts and Treaties; see *In re Arton* (No. 2), [1897] 1 Q. B. 601, where the High Court decided that *faux en écritures de commerce* was equivalent to “falsification of accounts.” See FORGERY.

F. C. S.—These letters stand for “free of capture and seizure,” and are generally used in “slips” for policies of marine insurance to denote that the insurer is not liable for loss or damage to the goods or ship arising from capture and seizure. “Capture and seizure” include takings by an enemy whether lawfully commissioned or not (*Goss v. Withers*, 1758, 2 Burr. 683); by mutinous passengers (*Kleinwort v. Shepard*, 1859, 1 El. & El. 447); by pirates (*Dean v. Hornby*, 1854, 3 El. & Bl. 180); by officers of the Government of the country to which the ship or goods belong (*Lozano v. Janson*, 1859, 2 El. & El. 160); and a ship being sunk by officers of a foreign Government (*Powell v. Hyde*, 1855, 5 El. & Bl. 607). Though “capture” standing alone may apply only to belligerent capture, the addition of “seizure” excludes that narrow construction (Lord Selborne, *Cory v. Burr*, 1883, 8 App. Cas. 393, 395); and “seizure” includes a forcible taking possession of a ship by African natives with the intention only of plundering the cargo and not of appropriating the ship (*Johnston v. Hogg*, 1883, 10 Q. B. D. 432, warranty “free from capture and seizure and consequences of any attempts thereat”). The words also cover all the consequential and necessary expenses of the capture and seizure, e.g. salvage for the recovery of the property (*Berens v. Rucker*, 1760, 1 Black. W. 313, money paid by way of compromise to captors after a preliminary decree of condemnation had been made); but not a ransom paid by the assured which is illegal (*Havelock v. Rockwood*, 1799, 8 T. R. 268; *Parsons v. Scott*, 1810, 2 Taun. 363; 11 R. R. 610). In policies made during wartime with British underwriters, the risk of “capture and seizure” does not cover capture or seizure by the British Government in the case of a ship belonging to the country at war with Great Britain, for that would be an illegal contract (*Furtado v. Rogers*, 1802, 3 Bos. & Pul. 191; 6 R. R. 752); though it will do so in the case of a British ship under these circumstances (*Lubbock v. Potts*, 1816, 7 East, 449; *Arnould, Marine Insurance*, 132 and 133). When the capture is the proximate cause of loss, it is immaterial that the capture was caused by a peril insured against, whether the underwriter is liable for capture or

not (*Arcangelo v. Thompson*, 1811, 2 Camp. 620; 12 R. R. 758; *Cory v. Burr, ante*). See MARINE INSURANCE.

Fealty.—In the system of feudalism, fealty was the bond by which the vassal or tenant was tied to the lord by his undertaking to be faithful to him, and was expressed in the oath of fealty, the profession of such fealty, faith, or fidelity made at the time of performing homage. Every lord could exact fealty and homage from his vassals, and fealty from his servants; and the oath of fealty became, and was in substance, the same as the ancient oath of allegiance (*q.v.*) made to the sovereign by all men of the nation, whether landholders or landless; and, as regards the king, fealty and allegiance were practically identical, the former being the expression of the latter, and there being no superior to the king, in favour of whom any exception or saving of faith had to be reserved.

Fealty is one of the services which copyholders are bound to render to the lords of manors in respect of their customary tenements; but it is usually now respited or commuted; and may be required upon every change of the lord or tenant; and, if refused, the lord may seize some property of the tenant, and detain it as a pledge, but cannot sell it as an ordinary distress. It cannot be done by attorney, the lord not being compellable to admit a tenant by attorney unless the fealty is respited.

Probably the fealty, as well as other payments not in the nature of rent, are not within the Statutes of Limitation (*Dart, Vendors and Purchasers*, 6th ed., p. 467).

[*Authorities.*—St. Bl. i., 11th ed., 178; ii. 414; iii. 443, 444; Stubbs, *Const. Hist.* iii. pp. 514, 515; Elton, *Copyholds*, 2nd ed., pp. 196 and 219.]

Feasts (Fasts, Holidays).—The Prayer-Book of the Church of England contains a table of feasts to be observed in the Church throughout the year (see Introductory Rubric). The Act 5 & 6 Edw. vi. c. 3, "Holidays and Fasting Days," enacts that "all the days hereafter mentioned shall be kept and commanded to be kept holidays and no other." With the exception of the Conversion of St. Paul and St. Barnabas, the list which follows is identical with the one in the Prayer-Book. For these feasts there are appointed lessons, and also proper collects, epistles, and gospels, and in the case of great festivals, proper prefaces.

Sec. 7 of the above-mentioned Act provides that the Knights of the Garter may keep yearly the feast of St. George. The Act was repealed under Queen Mary, but re-enacted in the first year of King James the First. The Prayer-Book also gives a table of vigils, fasts, and days of abstinence to be observed.

Canon 72 of 1603 provides that no minister without the licence of the bishop is to appoint or keep any solemn fasts either publicly or in private houses.

The Acts as to fasting, 2 & 3 Edw. vi. c. 9; 5 & 6 Edw. vi. c. 3, s. 2; 5 Eliz. c. 5; 27 Eliz. c. 11; 35 Eliz. c. 7, are now repealed; but Lord Coke says, 3 *Inst.* p. 200, "Before the late Acts, the eating of flesh on Friday was punishable in the ecclesiastical Courts, as it yet is, the jurisdiction being saved by the said Acts." June 20, the day of the Queen's Accession, is now the only solemn day for which a particular service is appointed (see also SAINT and SAINT'S DAYS).

[*Authorities.*—Gibbs. *Cod.*; Phillimore, *Eccl. Law*, 2nd ed.]

Fee—*Base.*—See **BASE FEE**.*Conditional.*—See **ESTATES**.*Expectant.*—See **ESTATES**.

Farm Rent.—A fee-farm rent is a rent that issues out of an estate in fee-simple, and is payable by the freeholder. It is sometimes used in the sense of a rent-charge payable as a consideration from purchaser to vendor. Cp. 2 Black. *Com.* 43: "A fee-farm rent is a rent issuing out of an estate in fee of at least one-fourth of the value of the lands at the time of its reservation; for a grant of lands reserving so considerable a rent is indeed only letting lands to farm in fee-simple, instead of the usual methods for life or years."

But the stricter meaning is a perpetual rent, and it is the duration not the quantity that is the distinctive feature. This is the true meaning of the term in the opinion of Mr. Hargrave (in his note to *Co. Litt.* s. 144 a), who says, "The word fee-farm certainly imports every rent or service (whatever the *quantum* may be) which is reserved on a grant in fee"; and he ascribes the definition as to one-fourth value to the fact that it was usual (but only usual) on grants in fee-farm to reserve a rent of not less than a third or fourth of the value of the land. If fee-farm rent is to be confined strictly to rent service, it cannot be a rent service unless created before *Quia emptores*, or by a grant from the Crown. The two contrary opinions as to the meaning will be found respectively at length in the note to *Co. Litt.* above mentioned, and in the reporters' note to *Bradbury v. Wright*, 1781, 2 Doug. 627, where the arguments on either side will be found collected.

Simple and Fee Tail—See **ESTATES OF INHERITANCE**.**Feigned Action.**—See **FEIGNED ISSUES**.

Feigned Issues.—Formerly many important questions were tried in the form of feigned issues, by stating that a wager was laid between two parties interested respectively in maintaining the affirmative and the negative of certain propositions. The trial of such issues was either authorised by Act of Parliament, as, for instance, by the now repealed Interpleader Act (1 & 2 Will. iv. c. 58, s. 1), and by the Tithe Commutation Acts (6 & 7 Will. iv. c. 71, s. 46; 2 & 3 Vict. c. 62, s. 35), or was directed by a Court of law or equity, or by a judge of one of the superior common law Courts in cases where some material fact was in dispute which was of too important a nature to be judged of summarily upon affidavits (see 2 Chitty on *Pleading*, 7th ed., p. 171; 1 Chitty's *Archbold*, 11th ed., p. 890).

Proceedings under feigned issues were practically abolished by 8 & 9 Vict. c. 109, s. 19, which, after reciting that the questions tried in the form of feigned issues might be as satisfactorily tried without such form, enacted that where any Court of law or equity desired to have any question of fact decided by a jury, such Court might direct a writ of summons to be sued out by such persons and against such persons as the

Court should think ought to be plaintiffs and defendants respectively, wherein the one party should affirm and the other deny the facts in issue, and thereupon all proceedings should go on and be brought to a close in the same manner as was then practised in proceedings under a feigned issue.

Now, the proceedings in such cases are regulated by Order 34, r. 9, of the R. S. C. 1883, which provides that when the parties to a cause or matter are agreed as to the questions of fact to be decided between them, such questions may, by leave of the Court or a judge, be stated for trial in an issue in the form No. 15 in App. B. (which is similar to that provided by the last-mentioned Act) with such variations as circumstances may require.

Felo de se.—See DIE BY HIS OWN HANDS; SUICIDE.

Felon; Felonious; Felony.—The derivation of these correlative terms is absolutely uncertain (Murray, *Dict. Eng. Lang.*, s.v.).

The customary classification of crimes (*i.e.* pleas of the Crown) in English law is into treason, felony, and misdemeanour (Steph. *Dig. Cr. Law*, 5th ed., art. 15). It is a mediæval anachronism. Bracton, *de Coronat.*, ff. 145, 154, states that neither the sheriff nor the lord of a franchise (except under special grant) could take cognisance of charges laid against the peace of the king or as felonies (*in felonid*). This rule probably explains the presence in an indictment of the word “feloniously” and of the conclusion against the peace, etc. (*hoc tangit personam ipsius domini regis et coronam suam*).

Treason is sometimes called a felony (see 60 & 61 Vict. c. 18, s. 1), but has for centuries been kept distinct from ordinary felonies both as to the mode of trial and as to the nature of the punishment. See TREASON.

Piracy *jure gentium* was not a common law offence, and could not therefore be felony (2 Steph. *Hist. Cr. Law*, 192), but certain forms of piracy have been declared felonies. See PIRACY.

The distinction between felony (*felonia*) and misdemeanour (*transgressio contra pacem*) is very ancient. The offences classed in early times as felonies all involved capital punishment as well as attainder and forfeiture, except *petty larceny* and *mayhem*, which came to be treated as misdemeanours (2 Steph. *Hist. Cr. Law*, 193). So that in substance until 1837 felony was an offence punishable by death with or without benefit of clergy. With the mitigation of punishments which was progressive from that date, the distinction between felony and misdemeanour is now rather of historical than practical importance, and it is now rare to create a new statutory felony. And, historically considered, felony seems to have meant an act or offence by a feudal vassal which involved the loss or forfeiture of his fee. This definition is wide enough to include treason. With the disappearance of feudal tenures and seigniorial rights (and as to persons who had not the status of vassal) it came to mean any offence (except treason and misprision of treason) which on conviction was punishable by attainder and corruption of blood, and by forfeiture of lands or goods (4 Black. *Com.* 95). The forfeitures for felony ceased in 1870 (33 & 34 Vict. c. 23). An offence is now felony, not by reason of its special punishment, but because that name is attached to it by common law or by the statute which creates it; and where a statute creates an offence and calls it

a felony, this attaches to the offence all the common law incidents of felony so far as not excluded by the terms of the enactment (*Coalheaver's case*, 1768, 1 Leach C. C. 61; *Gray v. R.*, 1844, 11 Cl. & Fin. 427).

The practical distinctions between felony and misdemeanour at the present time are—

1. That the powers with respect to arrest are larger in the case of felonies (see 1 Steph. *Hist. Cr. Law*, 193; and ARREST);
2. That a person indicted for felony is entitled peremptorily to challenge of the jurors or the panel summoned for his trial (6 Geo. IV. c. 50, s. 29; 7 & 8 Geo. IV. c. 28, s. 3); and that to enable him to exercise this right the jurors are sworn singly instead of all at once as in misdemeanour;
3. That in the case of certain felonies (viz. murder and treason felony) the jurors cannot be permitted by the Court to separate during the trial (60 & 61 Vict. c. 18). See JURY;
4. That, as a general rule, two distinct felonies are not allowed to be tried together. If more than one is included in the same indictment, the prosecutor is put to his election. This rule is subject to certain exceptions, as to larceny, embezzlement, and receiving, and as to offences with explosives (24 & 25 Vict. c. 96, ss. 6, 71, 92; 46 & 47 Vict. c. 3, s. 7 (2)), and does not apply where the counts of the indictment merely charge the offence constituted by a particular transaction in different ways;
5. That peers accused of felony are entitled to be tried by their peers (see PEERAGE);
6. That the prosecution must be on indictment found by a grand jury, and cannot be by information as in misdemeanour except in those cases in which summary jurisdiction over minor felonies is given to justices of the peace (42 & 43 Vict. c. 49);
7. That a new trial cannot be granted on a conviction for felony whether it is tried in the High Court or not. The authority for this is *R. v. Bertrand*, 1866, L. R. 1 P. C. 520; *R. v. Murphy*, 1869, L. R. 2 P. C. 535, in which the Judicial Committee dissented from the view of the Court of Queen's Bench in *R. v. Scaife*, 1852, 17 Q. B. 238;
8. That the costs of prosecuting all felonies are payable out of public funds (see COSTS, in *Criminal Cases*), and that all persons convicted of felony can be condemned to pay in relief of the public purse the whole or any part of the costs of their prosecution and conviction (33 & 34 Vict. c. 23, s. 3);
9. That the Court may award compensation to an amount not exceeding £100 by the felon for loss of property caused by felony to the person damaged (33 & 34 Vict. c. 23, s. 4);
10. That concealing a felon from justice is an offence of a more serious character than concealing a misdemeanant, if indeed the latter be an offence at all;
11. That compounding a felony, i.e. agreeing for valuable consideration either not to prosecute or to stay or stifle a prosecution instituted, is a substantive misdemeanour (*R. v. Burgess*, 1885, 16 Q. B. D. 141). Similar conduct as to a misdemeanour seems not to be a criminal offence (1 Steph. *Hist. Cr. Law*, 502); but the agreement is void and unenforceable (*Windhill Local Board v. Vint*, 1890, 45 Ch. D. 351). See PROSECUTION; HUSH-MONEY;
12. That conviction of felony and sentence to death, or penal servitude or imprisonment with hard labour or for over twelve months, vacates any military or naval office or public employment under the Crown and pensions, unless a free pardon is obtained within two months of the

conviction (33 & 34 Vict. c. 23), and disqualifies from civil rights until the punishment has been suffered or a free pardon received.

Punishments.—The punishment of felonies is now in all cases regulated by statute, either the Act creating the offence or that by which the death penalty is mitigated as to the particular offence, or in the case of felonies not otherwise dealt with by 7 & 8 Geo. IV. c. 28, ss. 8, 9; 1 Vict. c. 90, s. 5, as modified by the Penal Servitude Acts. The only felonies now punishable by death are murder (24 & 25 Vict. c. 100, s. 1), piracy with violence (1 Vict. c. 88, s. 2),* and setting fire to dockyards and warships (12 Geo. III. c. 24). See CAPITAL FELONIES; CAPITAL PUNISHMENT; PREVIOUS CONVICTION.

Binding over to keep the peace or be of good behaviour, not an appropriate punishment while felonies were all capital, is now a recognised addition to the other statutory punishments under the Consolidation Acts of 1861; and in the case of a first offence the Court occasionally puts the offender under recognisance to come up for judgment if called on (see Steph. *Dig. Cr. Law*, 5th ed., art. 18; and see RECOGNISANCE).

Where a felony is committed after a previous conviction of felony the offender can be sentenced to penal servitude for life, except where the second offence is simple (not petty) larceny (7 & 8 Geo. IV. c. 28, s. 11; Steph. *Dig. Cr. Law*, 5th ed., art. 19 and notes). See PREVIOUS CONVICTION.

Misprision of felony is a misdemeanour, and consists in concealing or procuring the concealment of a felony which he knows to have been committed, but to which he did not assent. It is punishable by fine and imprisonment (3 *C'o. Inst.* 140; Steph. *Dig. Cr. Law*, 5th ed., pp. 122, 401; 2 Burn, *Justice*, 30th ed., 518). See ACCESSORY; MISPRISION.

A "felon" generally (*e.g.* for purposes of libel actions) is a person who is under conviction and sentence for felony, the expiry of sentence or pardon relieving the prisoner from the stigma. See *Leyman v. Latimer*, 1877, 3 Ex. D. 15, 352; and PARDON. For the purposes of HUE AND CRY the word "felon" in the Sheriffs Act, 1887, seems to mean person suspected of felony.

"Felonious" is the epithet used to describe the state of mind essential to constitute any particular felony. The word "feloniously" (*felonice*) must be inserted in the indictment, and the existence of the particular mental state or intent (*mens rea*) must be proved by or be legitimately deducible from the evidence to warrant a conviction by verdict and judgment appropriate to the felony (*R. v. Tolson*, 1889, 23 Q. B. D. 168; and see MENS REA).

Feme Covert; Feme Sole. -See COVERTURE; HUSBAND AND WIFE.

Fence (Fr. *Défense*), Prohibition.—1. Magna Carta (25 Edw. I. c. 16) prohibits the putting in defence any rivers which were not in defence in the time of Henry II., and forbids the alteration of the bounds, etc., of his time. And see FENCE MONTHS.

2. A barrier along the boundary of land to keep animals in and trespassers out. There is no common law obligation on the owner or occupier of lands to fence his land from the highway or so as to prevent escape of his beasts on to the land of others, or the incursion of the beasts of others on to his land. The liability, if any, exists only by contract or prescrip-

tion (Addison on *Torts*, 6th ed., 129, 331). As to fences beside highways, see HIGHWAYS. There is a statutory obligation to fence certain excavations, mines, and quarries (see EXCAVATIONS; MINE; QUARRY), and to fence railways (see RAILWAY).

The unlawful and malicious cutting, breaking, or destruction of fences without any *bond fide* claims of right is summarily punishable for a first offence by a fine not exceeding £5, and compensation for the damage done, and for a second or subsequent offence by imprisonment with or without hard labour for not over twelve months (24 & 25 Vict. c. 97, s. 25); and see MALICIOUS DAMAGE.

Where the fence is wrongfully erected, either on a highway or elsewhere, it may be pulled down by persons qualified to assert the right (*Arlett v. Ellis*, 1827, 7 Barn. & Cress. 346).

Breaking down a fence on land in which deer are actually kept is punishable on summary conviction by a fine of £20, or 'in default by imprisonment (24 & 25 Vict. c. 97, s. 15); and see BARBED WIRE; GAME LAWS.

Fence Months; Fence Season; Fence Time (*in defenso*)—The close time for deer, fish, or game, usually the breeding season, during which they may not be killed or taken. In royal forests the fence month was for fifteen days before and fifteen days after old Midsummer Day, July 6, and during that period the inhabitants were not entitled to depasture their cattle in the forest (see Hunter on *Open Spaces*, 1896, p. 150). See FISHERIES; GAME LAWS.

Fencing Machinery.—See FACTORIES AND WORKSHOPS.

Feoffment—The earliest form of conveyance of CORPOREAL HEREDITAMENTS known to English law, being the most ancient of the assurances (*q.v.*) at common law. It was the only means by which one could transfer a freehold estate in possession to another not previously having some estate in the land (as in the case, *e.g.*, of a surrender) or some privity with the transferor. The transferor is called the *feoffor*, the transferee the *feoffee*. A feoffment consists of two parts, viz.—

1. The DELIVERY OF POSSESSION (called livery of seisin).
2. The limitation of the estate intended to be assured.

Livery of seisin was made either *on* the land itself (livery in deed) or *in sight of* it (livery in law). Words declaratory of the feoffor's intent to deliver possession to the feoffee, "limiting" at the same time the estate to be transferred to the latter, are all that is necessary to make the ceremony a valid transfer; in practice, however, some act symbolical of the delivery of possession (*e.g.* the delivery of a clod, twig, or key) often accompanied the words.

For *livery in deed* to be valid all persons other than the feoffor having any estate in the land must be absent at the time of livery, or, if present, must join in or consent to it. This absence or, as the case might be, consent is not, however, necessary in the case of a *livery in law*, but on the other hand *livery in law* to pass the estate must be perfected by entry, and such entry must be made by the feoffee during the joint lives of himself and the feoffor. These are the only essential points of difference between the

requisites of *livery in deed* and those of *livery in law*. We must add that the entry needed to perfect livery in law is an actual entry upon the land (entry in deed), except where the feoffee was forcibly prevented, in which case entry in law (*i.e.* claiming the land from a distance) sufficed.

Before the Statute of Frauds a feoffment need not to be valid be evidenced by any writing, yet in practice it was generally so evidenced by a *charter of feoffment*, and this deed or charter of feoffment was essential in the case of the feoffee being a corporation: *secus* if a corporation sole (*Co. Lit.* s. 94*b*). The limitation of the estate intended to be assured is often contained in the charter, and the feoffment being subsequently made is said to be *secundum formam chartæ*, *i.e.* with reference to the terms of the charter; such terms controlling the quantity of the estate passed by the *livery of seisin*.

The Statute of Frauds (29 Car. II. c. 3, s. 1) then, as has been said, first rendered writing necessary, but it was not till the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 3), that a deed was made essential. The latter Act, however, expressly exempts from its provisions feoffments made under a custom by an infant.

Feoffment to Uses.—In feoffments to uses is to be found the source of equitable estates in land. They were resorted to before the Statute of Uses as a means of circumventing the law, *e.g.*—

1. Feoffments of lands to laymen to the use of religious bodies to circumvent the law of mortmain.

2. Feoffment to A. to hold and dispose of the land after the death of B., the feoffor, according to the terms of his last will, where B. could dispose of lands only in his lifetime. See for other instances Williams, *R. P.*, 18th ed., pp. 163–166.

Tortious Operation of a Feoffment.—This was the result of a feoffor in possession purporting to give to a feoffee a greater estate than he himself had in the land, *e.g.* on a tenant for life making a feoffment in fee-simple, the estate thus given, though forfeitable immediately to the person claiming by a prior title, was good against everyone else. The feoffment was said to operate by tort. The Real Property Act (8 & 9 Vict. c. 106, s. 4) provides that no feoffment made after the 1st of October 1845 shall have any tortious operation.

Feoffments though fully valid have been now superseded by the more convenient statutory conveyances, but feoffments under a custom are frequently met with. To take the most frequent case; by the custom of GAVELKIND an infant of the age of fifteen may alienate by feoffment as freely as if he were of full age. This customary alienation is subject to certain reasonable and proper restrictions (see Sandys' *Customs of Lancashire*, pp. 166 *et seq.*).

1. The feoffment should be for valuable consideration, otherwise it would be voidable.

2. It should be evidenced in writing signed by the infant's hand.

3. The infant must be in actual possession at the time of feoffment.

These and other like conditions for the infant's protection have been recently discussed and recognised in *In re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525, where the authorities on the subject will be found. And where a vendor of gavelkind lands furnished to the purchaser as part of his title certain customary feoffments by infant coheirs in gavelkind, and it appeared on the face of the title that the purchase-money paid to the infants was not the full value of their shares, and that they were still

under twenty-one, the Court held that it could not force the title on the purchaser (*In re Maskell and Goldfinch*, loc. cit.).

[*Authorities*.—Challis, *Law of Real Property*; Goodeve, *Modern Law of Real Property*; and see article on "Feoffments" in Mr. Challis's "Introductory Essay on Assurances" to Comyn's *Abstract of Title*, 5th ed.]

Feræ Naturæ.—"Of wild nature."—See ANIMALS; BIRDS; GAME LAWS.

Fern.—1. As to the destruction of ferns, see ARSON, 4.; LARCENY; MALICIOUS DAMAGE.

2. On many manorial wastes copyholders have established a right to cut fern for litter (see *Delawarr v. Miles*, 1881, 17 CH. D. 538, 584; Hunter on *Open Spaces*, 1896, pp. 54–57; PROFITS À PRENDRE).

Ferrets were regarded at common law as of a base nature, and not the subject of larceny, even when tame and saleable (*R. v. Searing*, 1818, R. & R. 350). When kept in confinement or for a domestic purpose, they appear to fall within secs. 21 and 22 of the Larceny Act, 1861, sec. 41 of the Malicious Damage Act, 1861, and the Prevention of Cruelty to Animals Act, 1849, inasmuch as the ordinary ferret is never found in a wild state, or except in confinement, save when actually in use against rats or rabbits (see Stephen, *Dig. Crim. Law*, 5th ed., art. 316).

Ferry.—A ferry is a franchise or exclusive right of carrying passengers, animals, or goods across a river or other body of water at a particular place, and taking a toll for so doing, which is called *ferriage*. It can only be created by grant from the Crown, Act of Parliament, or prescription (*Trotter v. Harris*, 1828, 2 Y. & J. 285). "The owner of a ferry must, as incident to the ferry, have such right to use the land on both sides as to enable him to embark and disembark his passengers; but he need not have any property in the soil for that purpose; it is sufficient if he has the right to use the land for all the purposes of his ferry; he must have a right to land on both sides, but he need not have the property in the soil in either" (Holroyd and Bayley, JJ., *Peter v. Kendal*, 1827, 6 Barn. & Cress. 703; so Comyn, *Digest*, Piscary. (B)). When a ferry is created it becomes "a public highway of a special description; its termini must be in places where the public have a right, such as towns and villages, and highways leading to towns and villages; and the right of the grantee of a ferry is in the one case the exclusive right of carrying from town to town, and in the other, of carrying from one point to another all who are going to use the highway to the nearest town or village to which the highway leads on the other side" (Lord Abinger, *Huzzey v. Field*, 1835, 2 C. M. & R. 432); and the ferry-owner becomes liable to such duties and obligations of a highway owner as are correlative to the privilege which he derives from the ferry.

This privilege, which has been described as "a particular description of monopoly which the law allows to be created from its being presumed to be for the public advantage, and is not the grant of an exclusive right of carrying passengers and goods across the stream by any means whatever but only by means of a ferry" (Mellish, J., *Hopkins v. G. N. R.*, 1877,

2 Q. B. D. 123), may be asserted by action against anyone disturbing the ferry by setting up another ferry near it (*Huzzey v. Field*, ante, ferry across Milford Haven). "If a ferry is erected on a river near another ancient ferry, so as to draw away its custom, it is a nuisance to the owner of the old one. Where there is a ferry by prescription the owner is bound to keep it always in repair and readiness for the use of all the king's subjects; otherwise he may be grievously amerced; and it would therefore be extremely hard if the new ferry were allowed to share his profits which does not share his burdens" (3 Black. Com. 238, ed. 1841, Stewart). Or the ferry-owner may get an injunction against the disturber (*Churchman v. Tunstal*, 1659 and 1663, Hard. 162, and 2 Aust. 603; *Cory v. Farnmouth and Norwich R. C.*, 1844, 3 Hare, 593). And in an action for disturbance it is enough for the plaintiff to prove that he was in possession of the ferry at the time of the disturbance (*Peter v. Kendal*, above). But the extent of the area for the monopoly of a ferry depends on the need of the public for passage (Glen, *Highways*, 56); and a change of circumstances, such as an increase of population near the ferry, will justify other means of passage, whether of the same kind or not, in addition to the old ferry. "The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable, has not been clearly laid down. It seems reasonable to infer that if the franchise of a ferry is established for the facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances, erecting new highways on land, would carry with it a right to continue the line of these ways across a water highway; and it is obvious that the single landing-place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics" (Willes, J., *Newton v. Cubitt*, 1862, 12 C. B. N. S. 32). "It does not conclusively follow as a matter of law that because a new ferry diverts some of the traffic from an old ferry, it is actionable, and it may be that no action can be maintained in respect of the new ferry if it has been set up *bonâ fide* for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry" (Mellish, J., *Hopkins v. G. N. R.*, above). Building a bridge in the line of or close to an ancient ferry is not a disturbance of the ferry-owner's franchise, though such an opinion was once expressed (*R. v. Cambrian R. C.*, 1871, L. R. 6 Q. B. 422, overruled by *Hopkins v. G. N. R.*, above).

It is not a disturbance of a ferry, if a ferry imposes unreasonable restriction on trade or makes persons go round for an unreasonable distance, for anyone to ferry persons over to the opposite bank, but to a different place (*Tripp v. Frank*, 1792, 4 T. R. 666; 2 R. R. 495; *Dixon v. Curwen*, 1877, W. N. 4). *A fortiori*, if the ferry is limited and is not ancient, it is no disturbance of it in such a case (*Letton v. Goodden*, 1866, L. R. 2 Eq. 123).

The duty of a ferry-owner towards the public is to maintain the ferry in good order for the conveyance of persons and goods, and to charge only a reasonable toll for it; he must have expert and other ferrymen, and have present passage, and charge only a reasonable toll for the passage (*Payne v. Partridge*, 1691, Show. 257). He cannot discharge himself from this obligation by building a bridge, even though it be more convenient than the ferry (*ibid.*); and a person entitled under a special Act to set up a bridge and a ferry cannot substitute the ferry for the bridge, and leave the latter unrepaired (*Nicholl v. Allen*, 1862, 1 B. & S. 916). Though no action will lie against him for not keeping a boat for the ferry without proof of special

damage resulting therefrom, he may be indicted for it as for a nuisance (*ibid.*). A custom for the inhabitants of a particular place to be discharged of toll on a ferry, may be good; and they may prescribe for such a right or easement, *i.e.* custom or usage of keeping a ferry-boat (*Trotter v. Harris*, 1828, 2 Y. & J. 285, where, after a thirty-five years' usage was proved, the jury was allowed to presume that the ferry had a legal origin). In consideration of his public duties, a ferryman is said to be exempt from impressment (*Ex parte Fox*, 1793, 5 T. R. 276; 2 R. R. 596).

The liability of a ferry-owner or ferryman in respect of the goods intrusted to his custody, is that of a common carrier, namely, to keep them safely in all events; and he is not discharged if they are stolen by thieves (*Southcote's case*, 1601, 4 Co. Rep. 83 *b*). The mere fact of a ferryman carrying goods over a ferry does not imply such a contract, unless a custom is proved equivalent to such a contract (*Walker v. Jackson*, 1842, 10 Mee. & W. 161).

A mere notice by ferrymen that they will not be liable for damage to horses or carriages will not protect them from liability, if such notice be not brought to the notice of owners of such property (*ibid.*). A steam ferry-boat is liable for damage done by her to other vessels while crossing in a thick fog, and she cannot set up the plea of public convenience in favour of her doing so against a probable loss to life and property (*The Lancashire*, 1874, 2 Asp. 202).

[*Authorities*.—Comyn, *Digest*, Piscary (B); Wellbeloved, *Highways*; Glen, *Highways*.]

Fertilisers and Feeding Stuffs.—By the Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), sellers of fertilisers, *i.e.* manures manufactured in the United Kingdom, or imported from abroad, must deliver with the article an invoice stating (*a*) its name, (*b*) whether it is artificially manufactured or not, (*c*) the percentage of nitrogen, phosphates, soluble and insoluble in water, and potash which it contains. The invoice operates as a warranty (s. 1), and if false in any material particular to the prejudice of the purchaser, even if he bought for analysis, renders the seller liable to a penalty of £20 on a first and £50 on a subsequent summary conviction (s. 31 (*b*), 2). On a sale of artificially prepared cattle food a warranty is implied that the substance is soluble for feeding purposes, and if it is sold under a description implying that it is made of a particular substance or seed or seeds, that it is pure, *i.e.* prepared from these seeds or substances only; and an invoice must be given stating whether it is prepared from one or more than one substance or seed, which also operates as a warranty (s. 2). Sale as cattle food of an article containing ingredients deleterious to cattle, or worthless for feeding purposes, and not disclosed at the time of sale, entails a penalty of £20 on a first or £50 on a second summary conviction (s. 3 (1) (*c*)).

Elaborate provisions are made for appointing analysts for districts and the Board of Agriculture (s. 4), and for analysis of fertilisers or feeding stuffs by these analysts at the instance of the purchaser, with an appeal by seller or buyer from the district analyst to the Board of Agriculture analyst. See ANALYSIS.

Fever.—See DISEASE; EPIDEMIC; PUBLIC HEALTH.

F. G. A.—These letters stand for “free from general average,” and are generally used in the “slips” for policies of marine insurance to denote that the underwriter is not liable to make good general average losses suffered by the subject of insurance or the general average contributions due from it to other interests engaged in the voyage (see *Fisher v. Liverpool Maritime I. C.*, 1874, L. R. 9 Q. B. 418). See AVERAGE and MARINE INSURANCE.

Fiat.—The term “*fiat*” was formerly used to denote the indorsement of a judge upon a document embodying an application for leave to take some step in legal procedure, upon which indorsement a rule or order was drawn up (Tidd’s *Practice of the King’s Bench*, 9th ed., pp. 100, 108). It is now more generally used to signify an order made in chambers which does not require to be drawn up, but can be acted upon on production of the judge’s, master’s, or registrar’s indorsement on the summons, affidavit, or other document on which the application is made. These fiats are chargeable with a fee of three shillings in lieu of the ordinary charge of five shillings on an order drawn up. The purposes for which a fiat may be used in place of an order are strictly limited by Order 52, rule 14 of the Rules of the Supreme Court. Where a judge, master, registrar, or district registrar makes an order not embodying any special direction, but being merely for enlargement of time, or the issue of any writ other than a writ of attachment, or for amendment, or filing of any document, or for any act to be done by any officer of the Court other than a solicitor, the rule referred to provides that it need not be drawn up, but that the production of a memorandum signed by the person who made the order shall be sufficient. It is further provided that a direction added to the order that the costs thereof shall be costs in the cause is not to be deemed such a “special direction” as to compel the party to draw up the order. If, however, the costs are ordered to be paid by either party, it would not be possible to act upon the order without drawing it up, because a fiat or order not drawn up cannot in any case be enforced by execution.

The word “*fiat*” is also used to denote the indorsement or answer to a petition to the Court, and the leave of the Attorney-General to take certain proceedings which cannot be taken without such leave.

Fictions, Legal.—These were very generally in use both in the old Roman law and in English law, and were chiefly employed for the purpose of eluding then existing laws and rules of procedure and of usurping jurisdiction. A legal fiction is described by Maine as signifying “any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration,—its letter remaining unchanged, its operation being modified” (Maine’s *Ancient Law*, 7th ed., p. 26), and is more severely defined by Bentham as “a wilful falsehood having for its object the stealing legislative power, by and for hands which could not or durst not openly claim it,—and, but for the delusion thus produced, could not exercise it” (Jeremy Bentham’s *Works*, vol. i. p. 243).

Numerous instances of legal fictions are to be found in the old forms of proceedings, as, for instance, the process by which the Courts of King’s Bench and Exchequer, which originally had no jurisdiction over purely civil causes, contrived to obtain control over personal actions. This was effected in the King’s Bench by allowing the plaintiff to falsely allege that the defendant was in the custody of the king’s marshal for a breach of the

peace, and, having thereby brought the defendant within the jurisdiction of the Court on a criminal charge, the plaintiff was enabled to take proceedings against him for any civil wrong (3 Stephen's *Com.*, 11th ed., p. 358 *n*). In the Court of Exchequer the same result was obtained by the plaintiff falsely representing himself as a debtor to the king, and stating that by reason of the wrongful act or default of the defendant he was the less able to pay his debt (see *ibid.* p. 363 *n* (*u*)). The jurisdiction thus acquired was subsequently confirmed by the Uniformity of Process Act (2 Will. IV. c. 39), which at the same time abolished the necessity of having recourse to the fictions to which it owed its origin.

Instances of fictions in pleading also formerly occurred in the actions of trover and detinue. Thus, in trover the declaration falsely alleged that the plaintiff had lost the goods, the subject-matter of the action, and that the defendant had found them (see CONVERSION, ACTION OF); and in detinue the action might be founded on a supposed bailment even where none such had taken place (see DETINUE). The necessity for making these fictitious and needless averments of losing and finding, and bailment, in actions for goods and their value, was finally done away with by the Common Law Procedure Act, 1852, which at the same time abolished another fiction in pleading called *express colour* (15 & 16 Vict. c. 76, ss. 49, 64).

Another curious instance of legal fictions appeared in the old form of proceedings in an action of ejectment where the declaration alleged a lease to an imaginary plaintiff called John Doe and an entry and remainder in possession by him under such lease until he was ejected by an imaginary defendant called Richard Roe. These proceedings, it would seem, were originally adopted when the forms of action for recovery of land by persons having a freehold estate presented such difficulties that it was desirable to sue in the name of a lessee as on a chattel interest (see the First Report of the Common Law Commissioners, 1851, p. 54, where see also a concise statement of the mode in which these proceedings were conducted). See further, FEIGNED ISSUES; LATITAT.

Fiduciary Relationship.

A. IN REGARD TO UNDUE INFLUENCE.

1. *Principle*.—If a fiduciary relationship exists between the donor and donee at the time when a gift is made, such as to be likely to disqualify the donee for fairly and candidly advising the donor in regard to the gift, and if the gift is made without the donor having independent advice, the onus of showing that the gift was not procured by undue influence is cast upon the donee, should the gift afterwards come into question. The principle was stated by Brougham, L.C., in the following terms (*Hunter v. Atkins*, 1834, 3 Myl. & K. at p. 135):—"There are certain relations known to the law, as attorney, guardian, trustee. If a person standing in these relations to client, ward, or *cestui-que trust*, takes a gift, or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule, rightly considered, is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction" (*sc.* from which he derives a benefit in the nature of a gift), "place himself

exactly in the same position as a stranger would have been in; so that he may gain no advantage whatever from this relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation." And in *Huquenin v. Baseley* (1807, 14 Ves. 273; 9 R. R. 276), where a lady had made a gift to her spiritual adviser, Lord Eldon said: "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed around her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf" (14 Ves. at p. 300; cp. per Turner, L.J., in *Rhodes v. Bate*, 1865, L. R. 1 Ch. 252). It makes little, if any, difference where a fiduciary relationship exists that the donor or grantor is of full age to understand the transaction (*l.c.*).

2. *Legal Adviser and Client*.—In this case the rule goes beyond that above stated, and applied in the other instances mentioned below. It is a "hard and fast rule" that if a gift *inter vivos* is made by the client to his solicitor or counsel (*Rhodes v. Bate*, *supra*; *Brown v. Kennedy*, 1862, 33 Beav. 133; 4 De G., J. & S. 217), while the relationship continues, without the client having independent advice, it may be set aside at the instance of the client (*Liles v. Terry*, [1895] 2 Q. B. 679) or his representatives (see below, 9.). There is no such rule requiring a layman contracting with a solicitor to be separately advised, but if he is not, the onus of supporting the contract is thrown on the solicitor (*Readdy v. Pendergast*, 1887, 55 L. T. 767).

3. *Spiritual Adviser*.—The following are cases within the rule: Priest or minister, and a donor who has submitted to his direction (*Huquenin v. Baseley*, *supra*; *Morley v. Loughnan*, [1893] 1 Ch. 736); lady superior and nun (*Allcard v. Skinner*, 1887, 36 Ch. D. 145); spiritualist medium and victim (*Lyon v. Home*, 1868, L. R. 6 Eq. 655).

4. *Guardian and Ward*.—(*Hylton v. Hylton*, 1754, 2 Ves. 547; *Hatch v. Hatch*, 1804, 9 Ves. 292; 7 R. R. 195; *Everitt v. Everitt*, 1870, L. R. 10 Eq. 405.) An agreement made by the guardian with the intending husband of his ward as a condition of his consent to the marriage is also within the rule. To tolerate such an agreement would be paving a way for guardians to sell infants under their wardship (per Cowper, L.C., in *Hamilton v. Mohun*, 1710, 1 P. Wms. 118). It makes no difference that the guardian has not been legally appointed as such (see 5.) (see INFANTS).

5. *Parent and Child*.—(*Archer v. Hudson*, 1844, 7 Beav. 551; *Turner v. Collins*, 1871, L. R. 7 Ch. 329; *Hoblyn v. Hoblyn*, 1889, 41 Ch. D. 200.) Where a gift is made by a child to his father soon after the child has attained his majority, and before he has become "emancipated," the presumption is that an undue influence has been exercised to procure it (*Archer v. Hudson*, *supra*). But in this case the fact that a father has advised his son to assent to a settlement making a provision for other children, the son having no other adviser, by no means prevents the settlement from being upheld; unless it appears that the father has used his influence to obtain an unfair benefit for himself, such a settlement will, if possible, be supported as a FAMILY ARRANGEMENT (*q.v.*; see *Hoblyn v. Hoblyn*, *supra*, cited in the article referred to). The rule applies also to anyone who, at the material time, is *in loco parentis* (*Archer v. Hudson*, *supra*).

6. *Trustee and Cestui-que Trust*.—In *Barrett v. Hartley* (1866, L. R. 2 Eq. 789) a settled account agreed to by the *cestui-que trust*, allowing the trustee a bonus, was set aside. A trustee cannot "bargain with his *cestui-*

que trust for a benefit, and it is even said that a *cestui-que trust* cannot give a benefit to his trustee" (*Vaughton v. Noble*, 1861, 30 Beav. 34). This statement is made without qualification by Mr. Lewin (on *Trusts*, 9th ed., p. 294; but see *ibid.* p. 710). It is submitted, however, that it goes too far, for a *cestui-que trust* can even purchase the trust property if he deals with the trustee "at arm's length" (Lewin, p. 538; *Coles v. Trecothick*, 1804, 9 Ves. 234; 7 R. R. 167).

7. *Other cases* where a fiduciary relationship has been found to exist: doctor and patient (*Dent v. Bennett*, 1839, 4 Myl. & Cz. 269; *Mitchell v. Homfray*, 1881, 8 Q. B. D. 587); elder and younger sister (*Harvey v. Mount*, 1845, 8 Beav. 439); intending husband and wife (*Pope v. Horne*, 1848, 11 Beav. 227; *Corbett v. Brock*, 1854, 20 Beav. 524); persons living together as husband and wife (*James v. Holmes*, 1862, 31 L. J. Ch. 567).

8. Where the relationship is shown to have existed it is presumed to have continued down to the time of the gift, unless there is distinct evidence of its earlier termination (*Rhodes v. Bate*, 1865, L. R. 1 Ch. 252). And where the intention to make the gift is conceived before the relationship commenced, but carried into execution during its continuance, the rule applies (*Allcard v. Skinner*, 1887, 36 Ch. D. 145).

9. The gift may be set aside at the instance of the donor's executors (*Morley v. Loughnan*, [1893] 1 Ch. 736), but not after the donor himself has confirmed the gift (*Mitchell v. Homfray*, 1881, 8 Q. B. D. 587; cp. *Tyars v. Alsop*, 1888, 36 W. R. 919; 37 W. R. 339).

10. And the rule applies to gifts made not directly to the person whose fiduciary relationship to the donor would bring them into question, but made, at his instance, to others, and so that substantially he would benefit by the gift; for instance, to gifts to his wife or children (*Huguenin v. Baseley*, *supra*; *Liles v. Terry*, *supra*). And also to strangers who have notice of the circumstances of the gift, and of its voidable character (*Maitland v. Irving*, 1846, 15 Sim. 437; *Kempson v. Ashbee*, 1875, L. R. 10 Ch. 15). But a stranger, dealing for value with the person imposed upon, is only required to see that the latter has had independent advice (*Corbett v. Brock*, 1855, 20 Beav. 524).

11. The right to set aside the gift is lost by ACQUIESCENCE (*q.v.*) with knowledge of the right to set it aside, or by ratification of it, after the relationship has determined (*Allcard v. Skinner*, *supra*; *Mitchell v. Homfray*, 1881, 8 Q. B. D. 587; cp. *Hatch v. Hatch*, 1804, 9 Ves. 292; 7 R. R. 195).

12. *Will.*—Those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction (per Lord Hatherley in *Fulton v. Andrew*, 1875, L. R. 7 H. L. 448, at p. 471; *Hegarty v. King*, 1880, 7 L. R. Ir. 18). The rule goes further than this, and wherever the will has been prepared under suspicious circumstances, it ought not to be admitted to probate until the party propounding it has satisfied the Court that the testator knew and approved of its contents (*Tyrrell v. Painton*, [1894] Prob. 151). See CATCHING BARGAINS AND UNDUE INFLUENCE.

[*Authorities.*—White and Tudor's *L. C.*; notes to *Huguenin v. Baseley*.]

B. SECRET PROFITS.

It is a principle that a trustee shall not make a profit from his office, at any rate, otherwise than under a bargain which is made by the *cestui-que trust* freely and deliberately (see above, 6.). He can, of course, accept or bargain with the testator or settlor for any benefit under the will or settlement. The principle applies to agents (see PRINCIPAL AND AGENT).

guardians (see INFANTS), the directors (vol. iii. pp. 171, 179, 180), secretary (*M'Kay's case*, 1875, 2 Ch. D. 1), and promoters (vol. iii. p. 183) of a company, inspectors under creditors' deeds (*Chaplin v. Young*, 1864, 33 Beav. 414), the mayor of a corporation (*Bowes v. City of Toronto*, 1858, 11 Moo. P. C. 463), and generally to all persons clothed with a fiduciary character (Lewin on *Trusts*, 9th ed., p. 295).

Where, in such cases, the person standing in the position of principal or *cestui-que trust* is *sui juris*, and such that a contract could be made with him by the person standing in the position of agent or trustee that the latter shall retain the profit, and the profit is disclosed, and received without objection, it can be lawfully retained (see COMPANY, vol. iii. p. 179; and PRINCIPAL AND AGENT).

[*Authorities*.—Lewin on *Trusts*, ch. xiii.; Story on *Agency*, ss. 192, 207, 214; Bowstead on *Agency*, pp. 114–120.]

Field.—See ALLOTMENTS; FIELD GARDENS.

Field Gardens.—Provision is made by the Inclosure Acts, 1845 and 1846 (8 & 9 Vict. c. 34, 73), and the Commons Acts, 1876 (39 & 40 Vict. c. 56, ss. 21, 22, 23, 26, 27, 28), 1878 (41 & 42 Vict. c. 56, s. 4), and 1879 (42 & 43 Vict. c. 37), for the formation on the enclosure or regulation of commons of field gardens for the labouring poor, and for their clearing, draining, fencing, levelling, and improvement. The management of such gardens in rural districts is now vested in the parish council as allotment wardens or in the overseers and chairman of a parish meeting in parishes having no council (56 & 57 Vict. c. 73, ss. 6, 14, 19). In urban districts the management is in the sanitary authority. An annual report must be made by the managers to the Board of Agriculture (39 & 40 Vict. c. 56, s. 28; 52 & 53 Vict. c. 30, s. 2). See ALLOTMENTS.

Fieri Facias.—See EXECUTION.

Fighting.—See AFFRAY; ASSAULT; BATTERY; BATTLE, TRIAL BY; ASSEMBLY, UNLAWFUL; DUEL.

Fiji.—A group of islands in the Pacific Ocean, now forming a British colony. The Governor, who acts also as High Commissioner under the Pacific Islanders' Protection Acts of 1872 and 1875, is assisted by an Executive and a Legislative Council. The village and district councils of the natives are recognised, but regulations made by these bodies require the sanction of the Legislative Council. The Chief Justice of the Supreme Court is also Judicial Commissioner for the Western Pacific under the Order in Council of 13th August 1877. There is an appeal from the Supreme Court to the Queen in Council. See the Orders in Council of 22nd February 1878 and 15th March 1893; and PRIVY COUNCIL.

File.—The name applied to the bundle of documents in a cause or matter, which are usually strung together on some kind of thread. There is

a Filing and Record Department of the High Court where a large number of documents, such as affidavits, have to be filed. Indexes or calendars of these files are kept and are accessible to the public on payment of the usual fee (R. S. C. 1883, Order 61, r. 17).

Filed.—"‘Filed’ held to be included in return of *non est inventus*, *Hunter v. Caldwell*," Easter Term, 1847 (Dwarris, *Statutes*, 2nd ed., p. 673).

Filter Beds.—See WATER SUPPLY.

Filth.—See NUISANCE and PUBLIC HEALTH.

Filtration.—See WATER SUPPLY.

Final Hearing.—Where a defendant gave a cognovit not to be enforced "until after the final hearing of a Chancery suit instituted by the defendant against the plaintiff, and the final decree or order to be pronounced thereon," it was held that the words "final hearing" and "final decree" were not applicable to a decree which was being appealed from (*Jones v. Reynolds*, 1834, 1 Ad. & E. 384).

Final Judgment.—See JUDGMENT.

Final Order.—See ORDER, FINAL.

Final Port.—The words "final port of destination or of discharge" in a marine commercial contract mean the port where the ship is intended to and does discharge the bulk of her cargo; and the last port of discharge is not the port where the ship may have been originally destined to discharge any part of her cargo, but the place where she does actually discharge the whole of it (*Preston v. Greenwood*, 1784, 4 Dougl. 28 and 33; *Moffatt v. Ward*, *ibid.* 29). The words "last port of discharge" in such a contract mean "the last practicable friendly port of discharge" (Bayley, J., *Brown v. Vigne*, 1810, 12 East, 283, where the ship was bound on a voyage to the Plate, and the last port, Buenos Ayres, was in the hands of the enemy, so that Monte Video became the last port of discharge). But in another case where a ship was intended to go to Canton, but the Chinese War broke out, and the English stormed Canton, and the ship was lost at Hong Kong, it was held that she was covered by the policy, for Canton was still accessible and available as the final port of discharge, though ships went there at their own risk (*Oliverson v. Brightman*, 1846, 8 Q. B. 781).

Final Process.—Another term for execution on a judgment or decree. The phrase is contrasted with "original process" (*q.v.*), which signifies the step taken to compel the defendant to appear in the action.

and with "mesne process" (*q.v.*), which is process issued during the pendency of the suit.

Final Sailing.—These words, in a charter-party, bill of lading, or policy of marine insurance, mean "getting clear of a port for the purpose of proceeding on a voyage" (Lindley, L.J., *Price v. Livingstone*, 1882, 9 Q. B. D. 682). In a charter-party they are generally found in connection with the payment of freight, *e.g.* "an advance of one-third freight within eight days from final sailing of the vessel from her last port in the United Kingdom" (*ibid.*); and in policies of insurance in connection with the beginning or continuance of the risk, *e.g.* "warranted to depart on or before a particular day" (*Moir v. Roy. Ex. A. C.*, 1815, 3 M. & S. 461). The port of which the vessel is to be clear means the port understood in its "ordinary commercial sense," or "that which shippers of goods, charterers of vessels, and ship-owners mean by a port," though that may not be identical with the area of the port for fiscal purposes (Jessel, M. R., *Price v. Livingstone*, above; Lord Esher, *Sailing Ship Garston Co. v. Hickie*, 1885, 15 Q. B. D. 580, quoted by Lord Halsbury, *Hunter v. Northern M. I. C.*, 1888, 13 App. Cas. 717 and 723). This is exemplified by three decisions all turning on the question of whether a ship had "finally sailed" from the port of Cardiff. In the first the ship was in what was then called the Bute Ship Canal, and had got her clearances, and was quite ready for sea, but it was held that she had not sailed from the port, the artificial channel being within the port (*Roclandts v. Harrison*, 1854, 23 L. J. Ex. 169); in the second, the ship, after being loaded at Penarth Dock, was towed by a tug seven or eight miles, which brought her three miles into the Bristol Channel; and it was held that she had "finally sailed," though she was still within the limits of the port of Cardiff for fiscal purposes, and was driven ashore within the limits of the port in its commercial sense (*Price v. Livingstone*, above); in the third, where by charter-party freight was to be paid "two-thirds in cash ten days after the final sailing of the vessel from her last port in Great Britain," and the ship loaded at Cardiff for Bombay, and after clearing and proceeding down the artificial channel leading from the Bute Docks to the river Taff, collided with another vessel at a place three hundred yards beyond the junction of the channel and the river and had to return, it was held that she had not "finally sailed," for the "port" extended beyond the artificial channel (*Sailing Ship Garston Co. v. Hickie*, above). The word "sailing" in a marine commercial contract is satisfied by the ship breaking ground on the voyage, or beginning her voyage in a state of complete readiness, though she does not leave the port; but if her equipment is incomplete, and the voyage is not *bona fide* begun, it is not a "sailing" (*Thompson v. Gillespie*, 1855, 24 L. J. Q. B. 340; *Hudson v. Bilton*, 1856, 26 *ibid.* 27; *Lauy v. Anderdon*, 1824, 3 Barn. & Cress. 495). A vessel has been held not to have been "despatched from Australia" when she sailed from Moreton Bay, but the crew, after going a short distance, mutinied and insisted on her going to Sydney (*Sharp v. Gibbs*, 1857, 1 H. & N. 801).

Flinder of Property.—See DETINUE, vol. iv. at p. 241.

Fine.—In Crown cases, as in the law of real property, the term fine (*finis litis*) was originally applied to a sum paid by the defendant to put

an end to the litigation, which was termed making a fine with the king. It is distinct from AMERCEMENT (*q.v.*) (*Griesley's case*, 1588, 8 Co. Rep. 38), being an amount settled by a sort of bargain between the defendant and the justices, by which the defendant might avoid or put an end to his imprisonment, or to his prosecution; and, in fact, the practice of making fines appears to have been adopted by the king's justices in aid of the Exchequer, and to avoid the necessity of having the amount of an amercement settled by a jury as required by Magna Carta (see 1 Pollock and Maitland, *Hist. Eng. Law*, 515). Fines seem at times to have been made in felony cases; but they are usually confined to misdemeanours. Fines were in early times also described as a ransom (see 1 Hen. v. c. 3; 4 Black. *Com.* 380), and always carefully distinguished from FORFEITURE (*q.v.*).

The sense in which fine is now most commonly understood is a pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction or order of a Court in a criminal or quasi-criminal case (see 42 & 43 Vict. c. 49, s. 49). The order is usually if not invariably to pay the fine to Her Majesty. On the abolition in 1870 of forfeitures for treason and felony (see ATTAINDER), care was taken to declare that forfeiture did not include any fine or penalty imposed on any convict by virtue of his sentence (33 & 34 Vict. c. 23, s. 5). A fine is never imposed on a conviction of treason or felony except under the provisions of a statute authorising such imposition. A fine may be imposed for any misdemeanour to any amount which the Court thinks fit, subject, however, to any specific limit imposed by a particular statute and to the Bill of Rights (1 Will. & Mary, c. 2) and Magna Carta (25 Edw. I. c. 14), which prohibit "excessive" fines and amercements. The power to fine at discretion is given with respect to all the indictable misdemeanours under the Criminal Law Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71), with a power of imprisonment in default of payment.

The remedy for the fine was not by distress but by writ of *levari facias* or imprisonment till the fine was paid or sureties for its payment were found. The levy of fines imposed by Courts of oyer and terminer, etc., is regulated by the Levy of Fines Acts, 1822 and 1823; and see ESTREATS.

Courts of Summary Jurisdiction.—The maximum amount of every fine or penalty which may be imposed by a Court of summary jurisdiction depends on the statute, Order in Council, regulation, or by-law which creates the offence, or upon sec. 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which empowers a Court where the statute dealing with an offence punishable on summary conviction does not authorise a fine, to impose a fine not exceeding £25, if imprisonment appear not to be the appropriate remedy. The fine is leviable by DISTRESS. In default of distress, imprisonment can be imposed (11 & 12 Vict. c. 43, s. 19; 42 & 43 Vict. c. 49, ss. 4, 47).

The justices can mitigate the fines in case of a first offence (42 & 43 Vict. c. 49, ss. 4, 52; *Murray v. Thompson*, 1888, 22 Q. B. D. 142). But this power cannot be exercised—

(1) In proceedings under Acts relating to the regular or auxiliary forces:

(2) As to fines inflicted under an Act carrying into effect a treaty with a foreign State (42 & 43 Vict. c. 49, s. 54);

(3) In revenue cases (*Phillips v. Evans*, [1896] 1 Q. B. 305). The justices can also direct payment of a fine by instalments (42 & 43 Vict. c. 49, s. 7).

The power to impose a fine appears to have been exercised by all Courts of the common law, even by Courts leet (*In re Bishop*, 1292, 5 Seld. Soc. Publ. 45; 20 St. Tri. 780; *Godfrey's case*, 1615, 11 Co. Rep. 44).

The fine, when made or imposed, becomes *eo instanti* a debt of record, and (with the alleged exception of an indictment for non-repair of a highway) belongs to the Crown (*R. v. Woolf*, 1819, 2 Barn. & Ald. 609; 21 R. R. 412). The power to remit a fine resides in the Crown. The power of mitigating a fine was at one time exercised by the Court of Queen's Bench under a writ of Privy Seal issued for that purpose (2 Hawk., P. C., bk. ii. c. 25, s. 3); but the modern procedure appears to be by petition to the Treasury (*R. v. Loveden*, 1800, 8 T. R. 615, 618 n. (d)), which has taken over the functions of the Court of Exchequer on this subject (see *EXCHEQUER Practice*). In certain cases where no provision is made for payment of the costs of a prosecution, the Treasury will allow one-third of a fine to be paid to the prosecutor to reimburse his expenses.

By the Bill of Rights grants or promises of the fines or forfeitures of particular persons before conviction are declared illegal and void (1 Will. & Mary, st. 2, c. 2, and 3 Black. Com. 259). This prohibition did not affect the grants by charter of fines, etc., at Courts of oyer and terminer, etc., in favour of particular boroughs or liberties, which in early days were common (see *R. v. Mayor, etc., of London*, 1834, 1 C. M. & R. 1; *A. L. v. Nottingham*, 1897, 77 L. T. 210).

[*Authorities*.—Burn, *Justice*, 30th ed., "Fines, Forfeiture," etc.; Atkinson, *Mag. Ann. Pr.*, 1897, pp. 69-74.]

Fines.—Fines of lands were a very ancient method of transferring land, effected by a process that was in form the compromise of an action. They are said by Lord Coke to have existed before the time of the Conquest; and though this is probably too early a date to fix for their origin, there is no doubt that they are of very great antiquity, and are already so treated by Glanvill and Bracton. "A fine may be described to be an amicable composition or agreement of a suit, either *actual or fictitious*, by leave of the king or his justices, whereby the lands in question became or were acknowledged to be the right of one of the parties" (2 Black. Com. 349). The suit need not be a fictitious one, but the fact that by such a suit so good and unimpeachable a title could be given to lands led to the practice of instituting the suit for the sake of the transfer it served to effect; hence the origin and frequency of the collusive actions. The person who was *formally* the plaintiff, and *practically* the intending purchaser, was called the demandant, the defendant or vendor was called the deforçant; later on the terms *conusee* and *conusor* were used by lawyers to designate the demandant and deforçant respectively, these having reference to the *recognition* of the right of the one party by the other. The action was commenced by a writ demanding the lands; the deforçant then appeared, and thereupon, in consideration of a sum (practically the purchase money) paid by the demandant, acknowledged the latter's right to the lands in question, the action being compromised on these terms by leave of the Court. The fictitious cause of action was a covenant by the deforçant to convey to the demandant the lands forming the subject-matter of the action. The leave of the Court was granted, as a matter of course, upon payment of the requisite fee, called *the post fine*, later *the king's silver*. The next step was the *concord*, or terms of compromise—in modern parlance, the order by consent was then drawn up—setting out the acknowledgment of the demandant's rights by the deforçant. The concord must be thus acknowledged in person, either in Court or before a judge or commissioners, and the proceedings, so far as a valid and effectual transfer of the property was

concerned, were at an end. The official of the Court then drew up a short abstract of the writ and the concord, and from this abstract (called *The Note*) was drawn the *Foot*, called also the Chirograph, of the Fine. Indentures of this chirograph were made and delivered to the parties. These were the title-deeds of the property, and set out the whole transaction and parcels at length. It is the chirograph, therefore, which is the evidence of the owner's title, and the document which should be abstracted in any abstract of title to property of which the root of title is a fine. The process above described is called levying a fine. The fines thus levied* are divided into four classes, according to the operative words used in the concord, viz. :—

"(1) 'Sur conusance de droit come ceo que il ad de son done,' commonly called 'a fine come ceo.' This is the most frequent, and by it the conusor acknowledges that the conusee already has the lands by a former gift of the conusor.

"(2) 'Sur conusance de droit tantum.' This transfers only such right as the conusor has, and was most frequently used where the fee-simple in possession was not given.

"(3) 'Sur concessit,' granting the estate *de novo*, without acknowledging any previous right.

"(4) 'Sur done grant et render,' being a combination of (1) and (3) above, is a species of double fine, and used in order to create particular limitations of estate." (2), (3), and (4) were "executory fines."

This part of the subject cannot here be treated at greater length, and for a more detailed explanation of the above divisions the reader should refer to *Shep. Touchstone*, and also 2 *Black. Com.* 349 *et seq.* The fine, by virtue of the common law, took effect by estoppel, and bound the parties thereto and their privies. But a far more extensive operation and effect was given to fines levied with proclamations, by virtue of certain statutes. It is this latter class of fines that are of the greater importance, and with which alone we shall deal in the rest of this article. Fines of this class may be divided into four main heads, for the purposes of dealing with their nature and effect, viz. :

(1) A fine by way of bar of non-claim.

(2) A fine by way of barring an entail.

(3) A fine by a married woman.

(4) A fine enuring to uses.

(1) A fine levied with proclamations barred, by virtue of the common law, not only parties and their privies, but also all strangers who did not claim within a year and a day. The common law doctrine, though abolished by 34 *Edw. III. c. 16*, was restored in full force by 1 *Rich. III. c. 7*, and 4 *Hen. VII. c. 24*. The latter statute, however, extended the time for claiming to five years after proclamations made. To persons under disabilities (infants, *femes covert*, persons absent beyond the sea, etc.) a further period was given of five years after such disability had ceased. The proclamations required by the statute were sixteen, four times a term for four successive terms; these were subsequently reduced to one-fourth of the number respectively by 31 *Eliz. c. 2*. As to claiming by entry, it was provided by 4 *Anne, c. 16*, that an action must be brought within one year, and the claimant establish his right, otherwise such entry was to be of no effect.

(2) A fine levied by a tenant in tail operated to bar his issue, thus creating a base fee (*q.v.*); for although the Statute de Donis expressly provided that a fine so levied should be void at law, a fine levied with

proclamations operated by virtue of the Statute 4 Hen. VII. c. 24, called the First Statute of Fines. The Second Statute of Fines, 32 Hen. VIII. c. 36, expressly declared this to be the law by enacting that all fines levied with proclamations, according to the statute (*i.e.* 4 Hen. VII. c. 24), by any person of full age of twenty-one years, of any manor, lands, tenements, or hereditaments, before the time of the said fine levied in any wise entailed to the person or persons so levying the said fine, or to any of the ancestors of the same person or persons in possession, reversion, remainder, or in use, shall be, immediately after the fine has been levied, engrossed, and proclamations made, adjudged and taken as a sufficient bar and discharge against the said person and persons and their heirs claiming the said lands or any part thereof only by force of such entail (s. 1).

But a fine thus levied did not (otherwise than by "tortious operation") bar a reversion or remainder unless the reversioner or remainderman concurred, and owing to this defect recoveries were more frequently resorted to for this purpose (see ESTATES OF INHERITANCE, *Estates Tail*; RECOVERIES).

(3) *Fines by Married Women*.—Fines were frequently levied by married women for the purpose of extinguishing their rights in the lands in question. It was a frequent mode of barring dower, also releasing a wife's interest in lands of which she and her husband were joint tenants. In the former instance, as there was no need to bind any persons other than parties, there would be a sufficient bar by estoppel of the right to dower, and proclamations were unnecessary. As to the married woman's separate examination and acknowledgment, see *infra*.

(4) *Fines to Uses*.—These were adopted for the same purposes as feoffments to uses (see FEOFFMENTS). The uses were set out in an accompanying deed; the latter was said either to *lead* or *declare* uses respectively according to whether it was executed before or after the levying of the fine. The uses or trusts were declared by the conusor, the relationship between the latter and the conusee being that of settlor and trustee.

The above are the chief purposes and effects of fines. As to their validity, we may add that for a fine to be valid and of any effect the parties must have some interest in the lands at the time of levying it; if not, it could be set aside by third parties on the old plea of "*partes finis nihil habuerunt*." The plea was available if the parties had at the time only a chattel interest in the lands; on the other hand, any estate of freehold, whether in possession or expectancy, would support the fine. But a fine could also operate by tort in precisely the same way as a feoffment (see *Tortious Operation of a Feoffment*). Further, in the case of a married woman levying a fine, she must be examined apart from her husband before acknowledging the note.

Fines and recoveries were abolished by the Act 3 & 4 Will. IV. c. 74. The Act was entitled "an Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance." It enacts that no fines or recoveries shall be levied or suffered after 31st December 1833, except in the case where the writ had been already issued. The Act gives tenants in tail the power of disposing otherwise than by will of entailed lands in fee-simple, as against all persons claiming under the entail, and also subject to the conditions therein prescribed, as against remaindermen and reversioners. It provides also for the enlargement of base fees and the enrolment of disentailing deeds.

The Act also empowers a married woman to dispose of property, with her husband's consent, as fully as if she were a *feme sole*. The provisions of the Act, as the title states, are by way of substitution for the old fines and

recoveries, and the proceedings as to acknowledgment and examination are regulated on the old lines. For this reason it will be sufficient, on this part of the subject, to refer the reader to **ACKNOWLEDGMENT OF DEEDS**; on the provisions of the Fines and Recoveries Act as to estates tail, to **ESTATES OF INHERITANCE, Estates Tail**; on the provisions as to alienation by married women, to **HUSBAND AND WIFE**.

[*Authorities*.—See Cruise on *Fines and Recoveries*; Challis, *Law of Real Property*; and also the Introductory Essay on Assurances to Comyn's *Abstracts of Title*, by Mr. Challis.]

Fines (In Copyholds).—See **COPYHOLD**.

Fire.—1. As to the criminal use of fire, see **ARSON**.

Lighting bonfires in streets, thoroughfares, or public places is a petty misdemeanour, punishable on summary conviction (2 & 3 Vict. c. 47, s. 54 (16), London; 10 & 11 Vict. c. 89, s. 28, other urban districts).

2. Persons who use fire are bound to take all reasonable precautions to prevent its spreading to or damaging the property of others, inasmuch as it is a dangerous element, and falls within the rule of *Rylands v. Fletcher*, 1868, L. R. 2 H. L. 330.

Damage caused by criminal use of fire is recoverable from the offender, subject only to the now almost obsolete rule that if the criminal act was a felony the offender must be prosecuted before the action is tried.

No action for damage by fire results where the fire arises by mere accident in a building, and spreads to or damages the property of another (14 Geo. III. c. 78, s. 86). This provision, re-enacted from 6 Anne, c. 58, is contained in an Act most of which applied only to the city of London and certain metropolitan parishes, but appears to apply to the whole of England (*Richards v. Easto*, 1846, 15 Mee. & W. 244, 251; *Filliter v. Phippard*, 1848, 11 Q. B. 347; *Ex parte Goreley*, 1864, 33 L. J. Bank. 1; *Westminster Fire Office v. Glasgow Provident Society*, 1888, 13 App. Cas. 699, 713, 716). The enactment varies the rule of the common law that a man was *prima facie* liable to an action on the case for damage by fire arising on and spreading from his land. But where it is proved that a fire arises by negligence of the owner or his servants or contractors, an action will still lie, notwithstanding the statute (*Filliter v. Phippard*, 1848, 11 Q. B. 347; *Black v. Christ Church Finance Co.*, [1894] App. Cas. 48). This subject is very fully treated in Beven on *Negligence*, 2nd ed., pp. 587–606.

Contractual liability for damage caused by fire arises (1) under policies of insurance against fire (see **FIRE INSURANCE**); (2) under contracts of tenancy. Under English law if property let on lease is destroyed or injured by fire the lease continues and the landlord is under no obligation apart from express contract to abate or forego the rent or reinstate the premises. The tenant is liable for waste if the fire arose by negligence; but not liable at all if it was accidental, unless he has covenanted to repair and maintain the property, on which event he must reinstate the damaged buildings or pay damages (*Digby v. Atkinson*, 1815, 4 Camp. 278; and see Porter on *Insurance*, 2nd ed., pp. 271–274). If the landlord is insured his insurer can on paying the loss enforce the tenant's covenant by subrogation (*Andrews v. Patriotic Insurance Co.*, 1886, 18 L. R. Ir. 355; *Darrell v. Tibbits*, 1880, 5 Q. B. D. 560).

Shipowners are exempted from liability for injury by fire to goods

carried by them by sec. 502 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

Pawnbrokers, on the contrary, are absolutely liable for pledges destroyed by fire (35 & 36 Vict. c. 96, s. 27). See Attenborough on *Pawnbrokers*, p. 103.

Firearms.—This term includes all kinds of cannon, rifles, shot-guns, and pistols, whatever the compound used for propelling the missile or bullet.

1. *Trade.*—The manufacture and testing of firearms by private persons is regulated by local Acts, as to proof-houses, of which the latest appears to be 31 & 32 Vict. c. cxiii.

The exportation of firearms may be prohibited by proclamation or Order in Council (42 & 43 Vict. c. 21, s. 8), and their importation may be prohibited by Order in Council (39 & 40 Vict. c. 36, s. 43).

2. *Taxation.*—No person may use or carry a gun (including rifles, pistols, and air-guns) (*Campbell v. Hadley*, 1876, 40 J. P. 756), except in a house or curtilage, without an excise licence, which is not transferable, expires on July 31, and must be produced on demand (33 & 34 Vict. c. 57, ss. 2, 3; 46 & 47 Vict. c. 10, s. 6). The licence is forfeited for conviction for game trespasss in the daytime (33 & 34 Vict. c. 57, s. 11).

A register of the licences issued is kept, which is open to inspection (34 & 35 Vict. c. 57, s. 6).

A penalty of £10 is incurred for breach of the Act: but exception from its provisions is made in favour (1) of persons in the army, navy, volunteers, and police in the discharge of their duty, or on target practice; (2) of gunsmiths; (3) of common carriers; (4) of persons holding game licences; (5) of occupiers of lands using a gun to scare birds or vermin; (6) of persons carrying the gun of a licence-holder (same Act, ss. 7, 8; 53 & 54 Vict. c. 21, s. 35).

The penalties may be remitted by the Commissioners of Inland Revenue (53 & 54 Vict. c. 21, s. 35), and reduced to one-fourth by the convicting justices (7 & 8 Geo. IV. c. 53, s. 78); but apparently the justices cannot reduce them lower (see *Phillips v. Green*, [1896] 1 Q. B. 305).

3. *Offences.*—As to the use of firearms for poaching, see GAME LAWS. The more serious offences with firearms are dealt with under MURDER; OFFENCES AGAINST THE PERSON; DRILLING, UNLAWFUL; MANSLAUGHTER.

The following offences with respect to firearms are punishable on summary conviction:—(a) Being found drunk on a highway or public place in possession of loaded firearms (35 & 36 Vict. c. 94, s. 12); (b) wantonly discharging a gun or pistol within fifty feet of the centre of a highway which is a carriage-way or cart-way (5 & 6 Will. IV. c. 50, s. 72; Glen on *Highways*, 2nd ed., 389); fine, 40s., or imprisonment not over fourteen days. It is not clear how far this affects sportsmen (*Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142); (c) in urban districts outside London, to discharge firearms in a street (10 & 11 Vict. c. 89, s. 29); (d) in the metropolitan police district (i.) to discharge cannon within three hundred yards of a dwelling-house (2 & 3 Vict. c. 47, s. 55), (ii.) to keep ships' guns loaded with ball on the Thames or to fire them at night (s. 36), (iii.) to discharge firearms wantonly in a thoroughfare or public place, to the damage or danger of any person (s. 54 (15)).

Urban councils in districts where the Public Health Act, 1890, has been adopted may make by-laws to prevent danger from the use of firearms in shooting ranges and galleries (53 & 54 Vict. c. 59, s. 38).

The dangerous character of firearms requires persons loading, carrying, or using them to take the greatest care to avoid injury to others who are, or may be, within range (*Dixon v. Bell*, 1816, 5 M. & S. 198; *Potter v. Faulkner*, 1861, 1 B. & S. 800), otherwise they may be liable to indictment or action if any person is killed or injured by omission of the requisite precautions (*R. v. Hutchinson*, 1864, 9 Cox C. C. 555). But it has been held that, in the absence of intention or negligence, no liability attaches to a person who shoots another (*Stanley v. Powell*, [1891] 1 Q. R. 86; see *Beven, Negligence*, 2nd ed., 604, 678, 683).

Fire Brigade.—See FIRE POLICE.

Fire Curtains.—See LONDON CITY; MANOR.

Fire Escape.—See FIRE POLICE.

Fire Insurance.

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Nature of Contract.—Fire insurance is a contract whereby in consideration of the payment of an agreed premium the insurer undertakes to make good to the assured any loss or damage which may happen to specified property during a stipulated period. Fire policies—in this respect differing from marine policies—are usually for a specific sum, which bears no necessary relation to the value of the property insured. The amount payable in case of a loss, therefore, is not determined by the value of the property insured and injured, but simply by the amount of the damage. The sum payable can in no case exceed the amount named in the policy; but, as the contract is a contract of indemnity, if the loss is less, the amount for which the insurer is liable will also be less. In some cases, however, especially where the risk is large, a term is inserted in the policy providing that the insurers shall be liable, in the event of loss by fire, to make good such proportion out of the loss as the sum assured shall bear to the total value of the property at the time the fire breaks out; thus making the assured his own insurer for the residue. Such terms are called average clauses or average policies, and are similar to marine insurances. The contract is usually contained in a written instrument called a policy, which must bear a penny stamp (54 & 55 Vict. c. 39, s. 99). But it might be made by parol, though a duly stamped policy must be executed within a month afterwards (*ibid.* s. 100), under a penalty of £20.

Insurable Interest.—By reason of the Gambling Act 14 Geo. III. c. 43, the contract is void, if made on any event wherein the person for whose benefit or on whose account the policy is made has no interest, or so far as it is made for a greater sum than the amount or interest of the insured in

such event. The Act also requires (s. 2) that the name or names of the person or persons interested, or for whose benefit or on whose account the policy is made, shall be inserted in the policy. The effect of the decisions may be summed up by saying that any legal or equitable estate or right or responsibility, which may be prejudicially affected by a fire, will confer an insurable interest. For instance, a trustee may insure the trust property held by him; and in case of an infant *cestui-que trust* is expressly authorised to do so by statute (44 & 45 Vict. c. 41, s. 42); so may a bailee of goods; and so may an equitable owner; or a person who by another contract has made himself contingently liable as an insurer. The contract is a personal one, and the assured cannot generally transfer the prospective benefit with the goods or premises to their purchaser; for the assured must be interested both at the time of effecting the policy and when the loss occurs. A sale, however, subsequent to the loss would not prevent the assured suing as a trustee for the purchaser (*Sparkes v. Marshall*, 1836, 32 Bing. N. C. 761), or, since the Judicature Acts, the purchaser suing in his own name if his contract of purchase gives him the right to do so.

Conditions of the Policy.—The contract is usually entered into on the basis of a proposal signed by the intending insured, or by some person authorised on his behalf. The proposal consists chiefly of written answers to questions framed by the insurance companies for their guidance and protection, and it is essential that the questions should be answered truly. A knowingly false answer to an inquiry is deemed fraudulent, and would vitiate the policy. In some cases even innocent misstatements have sufficed to avoid the contract, when entered into on the faith of their being correct. Every fact that is in itself material to be known to the insurer ought to be communicated, and the fact that the proposer did not consider it to be material would be no justification for its concealment (*Lindenau v. Darborough*, 1828, 8 Barn. & Cress. 586; *Morns v. Heyworth*, 1842, 10 Mee. & W. 155). So also it is important, not only for the purposes of identification, but also for the purpose of properly estimating the risk, that the property to be insured should be accurately described. Locality is part of the description; thus goods insured in a certain building would not be protected if moved elsewhere (*Pearson v. Commercial Union Insurance Co.*, 1876, 1 App. Cas. 498). So also an alteration in the structure of a building, or in the nature of its contents after a policy is effected, may avoid a contract made on the footing of circumstances which no longer exist. If the alteration increases the risk, the insurer would not improbably insist on the policy being considered as at an end. How far any particular alteration may have this effect is a question of fact, to be determined by the jury or Court who have to decide the case. Unless the policy provides for the matter specifically, any change within the limits of fair and honest dealing is permissible, even though to that change the destruction of the property may be due (*May on Insurance*, s. 225).

Even if there has been a breach of the express or implied conditions which would entitle the insurers to avoid the policy, it must be remembered that it may be and often in fact is waived, either expressly or by acquiescence. Acceptance of a premium after notice of the breach amounts to acquiescence (*Wing v. Harvey*, 1855, 5 De G., M. & G. 265).

Policies often provide for the transfer of the insurance to other property of the same assured, if he should part with or transfer the property originally insured during the currency of the policy. This, however, is only a concession on the part of the insurer, on such conditions as to notice, alteration of risk, etc., as he may define; unless he chooses to concede such a privilege, the

insurer ceases to be liable directly the assured parts with the protected goods.

Duration of Policy.—A fire insurance is always entered into for a fixed period, usually in this country for a year or less, at the end of which time the risk comes to an end. The parties, however, can, and frequently do, renew the insurance without the issue of a fresh policy, by payment and acceptance of a further premium. It is, however, open to the insurers to refuse to accept such premium; and if they do, the policy lapses. A period of fifteen days after the date named as that of the end of the term, is usually allowed for payment of the renewal premium. If within those days of grace a loss should occur, the insured can still protect himself by paying the premium (*Salvin v. James*, 1805, 6 East, 571; 8 R. R. 540), it then being considered too late for the office to refuse it. But they are not bound to inform the assured that his premium is unpaid; and the policy may thus expire. It retains its full validity till the end of the last day named in it (*Isaacs v. Royal Insurance Co.*, 1870, L. R. 5 Ex. 296). If the tender is not made within the days of grace, the office may of course refuse it, and so avoid further liability; and if a loss has occurred during those days, they would probably do so. A payment or tender after the fact of loss was known to the assured, if then made without informing the insurers of that fact, would be held fraudulent, and prevent the policy so renewed being valid (*Bufe v. Turner*, 1815, 6 Taun. 338; 16 R. R. 626). Even if the fact of loss was unknown to both parties, still a renewal of the contract is based on the supposition that things remain *in statu quo*. If they do not, the whole transaction is founded on a mistake and of no effect (*Pritchard v. Merchants Life Assurance Co.*, 1858, 3 C. B. N. S. 622). In such cases the assured would be entitled to repayment of the premium (*ibid.*). It is repayable in all cases where the policy is void *ab initio*, or where the risk has not been run. But if the risk has once attached, though not for the whole agreed period, the premium is not returnable (*Anderson v. Thornton*, 1853, 8 Ex. Rep. 425). As already stated, the removal of goods from the premises named in the policy terminates the insurance; but most offices in practice renew their liability for the remainder of the term, on being informed of the removal, and being satisfied that their risk is not increased. They are not, however, under the wording of ordinary policies, legally bound to accept this fresh liability.

The Loss.—The wording of policies differs; but in all cases under a fire policy there must have been a loss by fire in order to enable the assured to maintain a claim. The property insured, or some substance near it not intended to create heat, must have been actually ignited. The mere overheating of a stove which causes damage without ignition is not enough (*Austin v. Drewe*, 1816, 6 Taun. 436; 16 R. R. 647). The proximate cause of the injury must also be fire. Where goods were destroyed by a mob, attracted by a fire on neighbouring premises, the Court held that the mob and not the fire caused the injury, although but for the fire the mob would not probably have assembled (*Marsden v. City and County Assurance Co.*, 1866, L. R. 1 C. P. 232). In cases of explosion consequent on fire on the insured premises, the insurers are, in the absence of express conditions limiting their liability, bound to pay for the damage so occasioned; but injuries caused by some distant explosion are not directly traceable to fire, and so would not come within the terms of the ordinary policies (*Taunton v. Royal Exchange Co.*, 1865, 2 Hem. & M. 235; *Everett v. London Assurance Co.*, 1865, 19 C. B. N. S. 126).

Notice of Loss.—All policies require the assured to give notice of a loss

within a limited period after it has occurred, so as to enable the insurers to investigate the circumstances. The conditions vary in different policies, but are usually so framed as to make a strict compliance with their requirements a condition precedent to the right to recover.

Arbitration.—Most policies contain a clause stipulating that in case of dispute, the amount of damages payable shall be determined by arbitration. The clause is usually so worded as to make the award a condition precedent to maintaining an action for the sum due under the policy. Where this is the case, no action can be brought successfully, unless the circumstances are very exceptional. See ARBITRATION.

Measure of Loss.—The amount payable is such a sum (not exceeding the sum insured for) as will indemnify the insured against the loss, in other words, the actual value of the property injured. In case of goods this is the difference between their value immediately before the fire and their value afterwards. Original cost, or the cost of replacing them, in many cases would not be a true test of their value. In fire policies, as in marine, it is open to the parties at the time of effecting the insurance to agree on the value of the property insured. But this is seldom done. Where the value has been so agreed on it is binding, unless it is shown that the agreement was induced by fraud (*Bruce v. Jones*, 1863, 32 L. J. Ex. 132). In case of buildings, the insurers always reserve to themselves the right of requiring the reinstatement of the building in place of paying over the money. They may, moreover, be required "upon the request of any person or persons interested in or entitled to any house or houses or other buildings which may be burned down, demolished, or damaged," to cause the insurance money to be expended, as far as it will go, towards rebuilding, reinstating, or repairing such house, etc. (14 Geo. III. c. 78, s. 83). The whole cost of rebuilding is not usually recoverable, as that would give the assured more than an indemnity, the value of new buildings being greater than that of the old ones. The sum payable in such a case is merely enough to make good the loss (*Fates v. Dunster*, 1855, 11 Ex. Rep. 15). Most leases contain covenants binding the tenant to insure, and to reinstate premises damaged by fire. The effect of such covenants is discussed under LANDLORD AND TENANT.

The occupier of premises on which a fire occurs may incur a greater loss than the value of his goods which are there destroyed. If the fire should arise through his fault, or that of his servants, he would be liable for losses sustained in consequence by other people. The risk of having to meet such a claim might be insured against; but seldom is specifically in this country. At common law this liability extended to all fires arising on his premises, however caused, but now by Statute 14 Geo. III. c. 78, s. 86, no action may be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall *accidentally* begin. The word "accidentally" does not, however, exclude liability in case the fire should arise through negligence (*Filiter v. Phippard*, 1847, 11 Q. B. 347). And it lies on the owner of the premises where the fire arose to show that its spreading to neighbouring premises was not due to any fault of his.

Prospective profits or consequential losses cannot ordinarily be recovered (*Wright v. Pole*, 1834, 1 Ad. & E. 61; *Wilson v. L. and Y. Ryw. Co.*, 1850, 9 C. B. 640). There is no legal objection to insuring profits specifically (*Wilson v. Jones*, 1867, L. R. 2 Ex. 139); but such policies are not common. Other risks may also be insured. For instance, rent, which is payable by a tenant whether his premises remain standing or not, may be and now frequently is insured.

Salvage.—If the owner is not insured to the full value of the goods injured, he remains entitled to the salvage after receiving payment from the insurers. If, however, he is fully insured, and his claim is admitted as a total loss, any salvage belongs to the insurers (*Da Costa v. Firth*, 1766, 4 Burr. 1966). The assured cannot, as in a marine policy, abandon undamaged goods to the insurers and insist on being paid the full amount for which they are insured. Nor can the insurers claim the salvage, unless the amount they have paid under the policy is the full value (see per Blackburn, J., in *Rankin v. Potter*, 1873, 6 H. L. at p. 118). But whenever there is a contract of indemnity, and a claim under it for an absolute indemnity, the party making the claim must abandon all his right in respect of that for which he receives indemnity (*Kaltenbach v. Mackenzie*, 1878, 3 C. P. D. 467).

Subrogation.—The contract of fire insurance is a contract of indemnity, and of indemnity only. The meaning of such a contract is that, in case of a loss, the assured shall be fully indemnified, but shall never be more than fully indemnified. The insurer who has paid the loss is entitled to stand in the place of the assured, and to enforce all the legal remedies and securities he had against third persons, as by action against the occupier of neighbouring property for negligently allowing a fire to spread (*Aldridge v. G. W. Rwy. Co.*, 1841, 3 Man. & G. 515); or by action against the hundred for damages due to riot or arson (*Clark v. Hundred of Blything*, 1823, 2 Barn. & Cress. 254; *Yates v. White*, 1838, 4 Bing. N. C. 272). The right of subrogation extends to cases of contract, e.g. to cases where policies have been effected with different insurers, the amount of which collectively exceeds the loss (*North British v. London, Liverpool, and Globe*, 1877, 5 Ch. D. 569; *Darrell v. Tibbits*, 1879, 5 Q. B. D. 560). Where, however, the insurances are not sufficient to cover the loss, the insured remains *dominus litis*, and may compromise the action he has commenced without obtaining first the consent of the insurer (*Commercial Union v. Lister*, 1874, L. R. 9 Ch. 483).

The right of the insurers is a right to make such a claim as the assured himself could have made. And consequently, at common law, any action had to be brought in the name of the insured, and could only be such an action as he was entitled to bring. If he was himself in default in respect of other property not the subject of the insurance, the insurers could not maintain an action against him, as he could not be forced to sue himself (*Simpson v. Thomson*, 1877, 3 App. Cas. 279). The necessity for suing in the name of the insured has been abrogated by virtue of the Judicature Acts, and the insurers can now bring such actions in their own name (*King v. Victoria Insurance Co.*, [1896] App. Cas. 250). The subject-matter in respect of which an action may be brought, however, remains unaltered. If the insurer has admitted his liability and paid under the policy, it seems not to be open to the wrong-doer, when sued, to object that the payment was voluntary and could not have been legally enforced. A payment so made entitles the insurers to the remedies available to the insured (*ibid.*).

If, instead of leaving his rights against other persons outstanding and unenforced, the insured receives payment or any benefit in lieu of payment from such persons, or voluntarily relinquishes such payment or benefit, the insurers are not deprived of their right to be subrogated to him, but can recover from him the amount which, but for his act, they could have claimed from those other persons (*Castellian v. Preston*, 1883, 11 Q. B. D. 280; *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226).

Contribution.—In cases where the risk has been insured in different

offices, complicated questions as to the rights of the assured and the various insurers frequently arise; but they have not so frequently been the subject of decision in the Courts, having been settled privately, and the legal rights are therefore still somewhat undefined. The assured is entitled to have his loss made good up to the aggregate amount of his insurances. If, therefore, his loss reaches or exceeds that amount, all the different insurers must pay the amount of their policies in full. But if the loss is less, it is not always easy to say at once how much each ought to contribute. Each insurer, as between himself and the assured, is liable to the whole amount of his insurance, if the loss reaches that sum, unless the policy otherwise provides, which is rarely the case. But between themselves their liability depends on various considerations. If all the policies are to insure the same subject-matter for the same assured, the insurers should contribute towards the loss *pro rata* in proportion to the sums insured by their respective policies (see *Pendlebury v. Walker*, 1843, 4 Y. & C. 441; Phillips on *Insurance*, s. 336). But where the insurances are on different properties, which include that injured and others as well, the calculation is not so easy; and it becomes more difficult still where the assured under the different policies are not the same persons, but different individuals having different interests. It is impossible to adequately discuss here the various questions which may arise. The reader is referred to the text-books dealing with the subject. But it should be remembered that whatever may be the rights of the insurers among themselves, each assured is entitled under his policy to be indemnified against the loss he has sustained (*Westminster Fire Office v. Glasgow Provident Society*, 1888, 13 App. Cas. 700).

Where the amount insured is large, insurance offices almost always diminish their liability by reinsuring part of their risk with other offices. In such cases it is understood that the office reinsuring retains a substantial part of the risk (*Traill v. Baring*, 1864, 4 Gif. 485). If a loss occurs, this is, of course, borne by the different companies who have taken shares in the policy in proportion to their respective interests; but the assured is only concerned with the company with whom his contract was made.

[*Authorities*.—See further Bunyon's *Law of Fire Insurance*; and cp. the articles on ACCIDENT INSURANCE; BURGLARY INSURANCE; LIFE INSURANCE; MARINE INSURANCE.]

Fire (in Commercial Contracts).—Although shipowners are exempted by statute from liability for any loss or damage by fire to goods, merchandise, or any other things taken in or put on board their ships which happens without their actual fault or privity (*M. S. A.*, 1894, s. 502 (1)), "fire" is a common exception in charter-parties and bills of lading, because of the (partially) wider protection afforded by it. The statutory exception only extends to fires on board the ship; and thus it has been held under a previous Act, identical in its wording with the present one, that a fire on board a lighter used in landing goods from a ship is not within the protection of the statute (*Morewood v. Pollok*, 1853, 22 L. J. Q. B. 250): that the exemption did not apply to fires in small craft engaged in inland navigation (*Hunter v. McGown*, 1819, 1 Bl. 573; 20 R. R. 198). The contractual exception covers all fires happening while the goods are in the hands of the shipowner under the contract, *i.e.* till delivery, and may be so expressed, *e.g.* "fire on board in bulk or craft or wharf, in warehouse or cases or on shore" (*Gatliffe v. Bourne*, 1844, 7 Man. & G. 865; Carver, 83);

but, at the same time, it will not apply to loss by fire caused by the negligence of the shipowner's servants who are navigating the ship, unless it is so expressly stipulated (*The Xantho*, 1887, 12 App. Cas. 503, 510, and 515); nor does it exempt the shipowner from contributing in general average for loss caused by fire except under the same condition (*Schmidt v. Royal Mail Co.*, 1876, 45 L. J. Q. B. 646). Fire is not a "peril of the sea" in a commercial contract, if accidentally caused (*Hamilton v. Pandorf*, 1887, 12 App. Cas. 518, 527); nor is it an "act of God" unless quite independent of human action, *e.g.* caused by lightning (*Forward v. Pittard*, 1785, 1 T. R. 27; 1 R. R. 142).

In policies of insurance "fire" is generally specified as a peril insured against, and this includes a fire voluntarily caused in order to avoid the ship's capture by an enemy (*Gordon v. Rimmington*, 1807, 1 Camp. 123; 10 R. R. 656); fire caused by lightning accident or the act of enemies; fire on board a steamer just as in any other vessel (*Pattison v. Mills*, 1728, 1 Dow. & C. H. L. 342); an accidental fire to goods landed and stored ashore in the ordinary course of a particular trade (*Pelly v. Roy. Ex. A. C.*, 1757, 1 Burr. 341); and fire due to the negligence of the master or crew, if they were originally competent, *i.e.* when the voyage began (*Bush v. Roy. Ex. A. C.*, 1818, 2 Barn. & Ald. 73; 20 R. R. 350). It does not include damage done by explosion of steam (*Thames and Mersey M. I. C. v. Hamilton*, 1887, 12 App. Cas. 484, overruling *West India Tel. Co. v. Home and Colonial M. I. C.*, 1880, 6 Q. B. D. 51); nor fire caused by spontaneous combustion, *i.e.* the inherent vice of the thing insured, or by its damaged condition at shipment (*Boyd v. Dubois*, 1811, 3 Camp. 133); though if the goods insured are sea-damaged after shipment, and ignite, the loss is covered by the policy, and so is any loss to the ship or to other goods not inherently vicious caused by fire due to the inherent vice of the goods insured (*Montoya v. London Ass. Co.*, 1851, 6 Ex. Rep. 451). See MARINE INSURANCE.

Fire-plug.—Outside London, under secs. 38 and 39 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), water companies, on the request, and at the cost of, the urban authority, must fix proper fire-plugs in their mains and other pipes at a distance of not over a hundred yards apart, or at a less distance if so prescribed by the company's special Act. They must also put up a notice on adjacent houses or walls indicating the position of the plug, and must renew the plug and keep it in repair, and provide keys, to be kept at the local fire brigade station. These sections do not oblige the company to put in a plug where the main is insufficient to carry it, nor to enlarge their mains at their own expense for the purpose (*R. v. Wells Water Works Co.*, 1886, 55 L. T. 188).

If required by the occupier of any works or factory in any street, the water company must, at his expense, fix and effectually maintain a fire-plug as near as conveniently may be to the works (s. 40).

A sufficient pressure of water must be maintained in pipes in which fire-plugs are fixed to enable persons to take water gratuitously for extinguishing fires (s. 40). The penalty for not obeying the Act is by summary proceedings under sec. 43, and not by action by the persons damaged by the neglect or refusal (*Atkinson v. Gateshead Water Works Co.*, 1877, 2 Ex. D. 441). The company is excused where the failure of water arises from frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs.

Under sec. 66 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), urban sanitary authorities are bound to cause the provision and maintenance of fire-plugs and all necessary works, machinery, and assistance for securing an efficient supply of water in case of fire, and must mark on adjacent buildings or walls the position of the plugs. To carry out this duty they may enter into contracts with water companies. A similar power is contained in sec. 124 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). In London the fixing of fire-plugs and hydrants is also regulated by sec. 32 of the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), as amended by sec. 34 of the Metropolitan Water Act, 1871 (34 & 35 Vict. c. 113), and the supervision of the execution of the regulations is in the hands of the London County Council.

The water company or other authority by which a fire-plug is fixed or maintained appears to be liable for damages for injury sustained by neglect to keep it in proper order, and flush with the highway, and safe to walk over (see *Thompson v. Brighton*, [1894] 1 Q. B. 333; *Beven on Negligence*, 2nd ed., 354; *Michael and Will on Gas and Water*, 4th ed., 248). But the company or authority is not liable when, by the neglect of the highway authority, the highway is allowed to wear away round the plug (*Moore v. Lambeth Water Works Co.*, 1886, 17 Q. B. D. 462); and where water escapes owing to the unforeseen effect of frost, the company, as a rule, is not liable. The local authority is not under any obligation to bear the expense of keeping fire-plugs in repair unless they were fixed by their authority or at their request (*Grand Junction Water Works Co. v. Brentford Local Board*, [1894] 2 Q. B. 735).

Fire Police.—1. In towns provision is made with a view to prevent risk by fire (1) in the case of London by the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), as to buildings in general, and by 41 & 42 Vict. c. 32, ss. 12, 16, and the regulations made thereunder, as to theatres and places of public entertainment (see *Glen, London Building Act*, pp. 376, 491); (2) in other urban districts by the power to make by-laws as to the construction of buildings and the provisions as to licensing places of public entertainment (53 & 54 Vict. c. 59, s. 51), which enable the licensing authority to refuse a licence except on condition that precautions against fire are adopted (cp. *R. v. Yorkshire West Riding County Council*, [1896] 2 Q. B. 368). Special provision is made as to Middlesex by 56 & 57 Vict. c. 15; and licences in rural districts depend on 25 Geo. III. c. 36 and 6 & 7 Vict. c. 68, now administered by County Councils under sec. 3 (v.) of the Local Government Act, 1888.

2. The giving of false alarms of fire is summarily punishable in London under a local Act, 56 & 57 Vict. c. cxxxi. s. 16; and elsewhere in the United Kingdom, 58 & 59 Vict. c. 28.

3. The statutory provisions for the extinction of fires and for providing means of escape in case of fire, except as to FACTORIES AND WORKSHOPS, are different (a) in rural districts, (b) in urban districts, (c) in London.

(a) *Rural Districts.*—In rural parishes where the Lighting and Watching Act, 1833 (3 & 4 Will. IV. c. 90), has been adopted, the parish council or other administrative authority may provide and keep up fire engines and provide for their housing, and engage and pay people to work them (s. 44); and where the Act has not been adopted nor the district council been given urban powers (38 & 39 Vict. c. 55, s. 171), the parish council or meeting can provide a fire engine and fire-escape under sec. 29 of the Poor Law

Amendment Act, 1867 (30 & 31 Vict. c. 106; and see 56 & 57 Vict. c. 73, s. 6 (c) iii.).

(b) *Urban Districts*.—In urban districts and in rural districts where the council has acquired urban powers, the council may provide apparatus for extinguishing fires, including engines, pipes, escapes, etc., and build engine houses, and stables for the necessary horses, and employ and pay the necessary men (10 & 11 Vict. c. 89, s. 32; 38 & 39 Vict. c. 55, s. 171 (2)). In a borough, police officers may be employed as firemen (56 & 57 Vict. c. 10, s. 2).

The municipal firemen are entitled to exclude the public and even volunteer fire brigades from premises on fire (*Carter v. Thomas*, [1893] 1 Q. B. 673). The engines, etc., may be sent out of the district to put out fires, but the expense of the excursion may be charged to the owner of the building on fire (10 & 11 Vict. c. 89, s. 33; see *Drightlington Local Board v. Bower*, 1873, 22 W. R. 165; *Sale v. Phillips*, [1894] 1 Q. B. 349).

(c) *London*.—The extinction of fires in London is provided for by the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), which is administered by the County Council. The Act deals with the organisation of the brigade and its expenses, to which the Treasury and the fire insurance companies contribute (ss. 13–18). The members of the force and the police are given wide powers of keeping order and excluding the public from streets and houses where a fire is in progress, and generally for saving life and property. They and the salvage corps employed by the fire offices can take possession of houses and property with a view to its protection; the brigade may pull houses down to stop the fire. The latter class of damage is treated as loss by fire under an insurance policy (s. 12; and see Porter on *Insurance*, 2nd ed., p. 120).

The County Council is liable for loss or damage to property taken possession of, if due to the neglect or dishonesty of its officers (*Joyce v. Metropolitan Board of Works*, 1881, 44 L. T. 811).

As to fires in chimneys and the provision of fire-plugs, see CHIMNEY; FIRE-PLUG.

Fireworks.—1. The manufacture and sale of fireworks was for long a common nuisance (9 & 10 Will. III. c. 7). It is now regulated by the Explosives Act, 1875 (38 & 39 Vict. c. 17), and the Orders in Council and of the Secretary of State made thereunder. See EXPLOSIVES.

2. It is an offence punishable summarily for any person (a) wantonly to let off a firework within fifty feet of the centre of a highway which is a carriage-way or cart-way—penalty not exceeding 40s. (5 & 6 Will. IV. c. 50, s. 72); (b) to throw or let off fireworks in a highway, thoroughfare, or public place—penalty not exceeding £5 (38 & 39 Vict. c. 17, ss. 80, 91). The offence, if committed in a thoroughfare or public place in the metropolitan police district, can be summarily punished by a penalty not exceeding 40s. (2 & 3 Vict. c. 47, s. 54 (16)), and in districts subject to the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89, s. 29), a similar penalty, or fourteen days' imprisonment, if the act is done in a street to the annoyance or obstruction of the inhabitants or passengers.

The leading case as to civil liability for injuries by fireworks is *Scott v. Shepherd*, 1773, 2 Black. W. 893. In *Whitby v. Brock*, 1888, 4 T. L. R. 241, it was held that the mere occurrence of an accident in letting off fireworks in a lawful place on a lawful occasion put upon the person com-

cerned the obligation to show that proper care had been taken (see *Beven, Negligence*, 2nd ed., 604).

Firm.—See PARTNERSHIP.

Firman—An ordinance issued by the Sublime Porte (and presumably, by any other Mussulman Court). Permissions to trade granted to foreign merchants in the Levant are given by Firman. Littré (*Dictionnaire*) derives it from the Persian *Framatara*, commanding.

First—

Accrued.—As to meaning of in connection with limitation, see *Irish Land Commission v. Junkin*, 1890, 24 L. R. Ir. 40. See further, ACCRUED OF RIGHT TO LAND and LIMITATION.

Charge.—See CHARGE; EQUITABLE CHARGE.

Disclosed.—Sec. 85 of the Larceny Act, 1861, provided that what are known as the factor sections of that Act (ss. 75–84), while punishing as crimes certain frauds by officers and members of corporate bodies and factors and agents, should be no bar to complete disclosure in civil proceedings by persons within the penalties of the sections; but provided also that the witness should not be prosecuted for any of these offences if it were first disclosed in his evidence in a civil proceeding, or in bankruptcy.

By sec. 27 of the Bankruptcy Act, 1890, the provisions italicised have been repealed; but the incriminating statement is not admissible in evidence, although such statements are admissible in proceedings for offences against the bankrupt laws (see *R. v. Erdheim*, [1896] 2 Q. B. 260). The protection of the Act of 1861, however, still extends to other civil proceedings, and even to compulsory examinations in the liquidation of joint-stock companies.

Fruits.—See ANNATES and QUEEN ANNE'S BOUNTY.

Offenders.—In the days when treason and almost all felonies were capital offences, the only mode of mitigating the penalties in the case of first offences was (1) by reprieve as a preliminary to absolute or conditional pardon; (2) by grant of clergy in the case of clergyable offences (see BENEFIT OF CLERGY); (3) by binding over the offender to come up for judgment when called on.

On the mitigation of punishment for felony and the abolition of attainder and forfeitures (33 & 34 Vict. c. 23) no specific statutory provision was made for allowing a felon to be released on recognisances to be of good behaviour and to keep the peace, a form of qualified punishment which was not consistent with the status at common law of a convicted felon. And the only statutory warrant for this procedure in the case of felony is the requiring of such recognisances in addition to other penalties under the Criminal Law Consolidation Acts of 1861. It had, however, long before 1887 been the practice in the case of minor felonies to put the offender, if the case required it, under recognisances to come up for judgment if called upon. In the case of misdemeanour it has always been

lawful to substitute recognisances for the peace and good behaviour for other punishment.

In 1887 was passed the Probation of First Offenders Act (50 & 51 Vict. c. 25), which deals only with larceny, false pretences, and offences not punishable by more than two years' imprisonment (which are all misdemeanours) and with convictions of young persons against whom no previous conviction of any kind is proved. The Court, if it thinks fit, having regard to the youth, character, and antecedents of the offender, and (the Home Office treats this as meaning "or," see 56 J. P. 330) the trivial nature of the offence, and any extenuating circumstances, may bind him, by recognisance with or without sureties, to come up for judgment, and in the meantime to keep the peace and be of good behaviour. Before acting, the Court has to ascertain if the offender or his sureties have a fixed residence within its district. If the condition of the recognisance for good behaviour is broken, a warrant may be issued for the arrest of the offender, on which he will be remanded for judgment.

This Act seems to have been begotten by unreflecting philanthropy out of ignorance of the law, and in practice is treated as a counsel of mercy and not as an enactment to be complied with, for it is so drawn as rather to fetter the Court's discretion than to enlarge it, except in the cases of a plea of guilty of larceny of over 40s. before a Court of summary jurisdiction. Courts for the trial of indictments prefer to follow the prior procedure, and Courts of summary jurisdiction have more suitable powers under sec. 16 of the Summary Jurisdiction Act, 1879 (except in revenue cases and in the case of a plea of guilty of larceny of property worth over 40s.), by which they need not proceed to conviction at all; or if they convict, can discharge the offender on finding sureties, and with or without paying damages and costs. In the case of a first conviction for larceny or malicious damage triable summarily under the Acts of 1861, similar powers can be exercised (24 & 25 Vict. c. 96, s. 108; c. 97, s. 66).

Voyage.—See VOYAGE.

Fish.—1. At common law there is no right of property in fish in a river or pond in their natural liberty (*R. v. Hunsdon*, 1781, 2 East, P. C. 611). But they are the subject of property if taken in a trunk or net or put in a stew pond (Foster, *Crown Law*, 2nd ed., p. 366; Russell on *Crimes*, 6th ed., vol. ii. p. 248).

The right to take fish is a *profit à prendre* belonging to the owner of the soil under the water in which the fish are, or his grantees.

The case of public navigable and tidal rivers is an apparent but not a real exception, the soil of the bed being in the Crown; and the right of the Crown to grant fishing rights, to the exclusion of the public, having been made illegal as to grants since Henry II. (see Mag. Cart. 25 Edw. I. c. 16). Oyster fisheries in such waters are protected from theft by 24 & 25 Vict. c. 96, s. 26, where the private title to the fishery is established and sufficiently known (*R. v. Downing*, 1870, 11 Cox C. C. 580).

In rivers which are not tidal, whether navigable or not, the right to fish presumably belongs to the owner of the bed of the stream, i.e. presumably the riparian owners on either side *ad medium filum aquæ* (q.v.), or to persons claiming by grant from them. Claims of a public right to fish in such rivers have been made, but have no legal foundation (*Smith v. Andrews*, [1891] 1 Ch. 678; *Neill v. Duke of Devonshire*, 1883, 8 App. Cas. 154).

2. Statutes have from time to time been passed to punish persons wrongfully taking fish. Those prior to 1800 are collected and discussed in 2 East, P. C. 610. They were superseded by 7 & 8 Geo. IV. c. 29, and that by the Larceny and Malicious Damage Acts of 1861 (see Greaves, *Crim. Law Cons. Acts*). Persons who unlawfully and wilfully angle in the day-time in waters where they have no right or leave to fish are liable to have their tackle seized by the owner of the land or fishery; and if they submit to this are liable to no other damages or penalties (24 & 25 Vict. c. 96, s. 25).

Angling by night entails a penalty of £5 if done in water actually adjoining (*R. v. Hodges*, 1829, M. & M. 341) or belonging to a dwelling-house, and of £2 if done in water elsewhere which is private property or subject to a private right of fishery. Unlawfully or wilfully taking fish at any hour otherwise than by angling is an indictable misdemeanour, if done in waters belonging to or adjoining a dwelling-house, and involves a penalty of £5 and forfeiture of the fish taken, if done in other private waters (24 & 25 Vict. c. 96, s. 24). In the latter case the attempt is equally punishable, and the penalty is recoverable summarily. The owner of the waters fished or the fishery can seize the tackle of persons unlawfully fishing. Crayfish are within these enactments (*Caygill v. Thwaite*, 1886, 33 W. R. 581). A *bonâ fide* claim of right to fish ousts the jurisdiction of the justices (*Hargreaves v. Diddams*, 1875, L. R. 10 Q. B. 582).

It is a misdemeanour (1) unlawfully and maliciously to put lime or any noxious material into a fish-pond or any water which is private property or in which there is a private right of fishing, or into a salmon river, with intent to destroy the fish which are or may be put therein (24 & 25 Vict. c. 97, s. 32; 36 & 37 Vict. c. 71, s. 13); (2) unlawfully and maliciously to cut through, break down, or destroy the dam, floodgate, or sluice of any such pond or water (24 & 25 Vict. c. 97, s. 32).

The punishment is penal servitude from three to seven years or imprisonment with or without hard labour for not over two years, and (or) fine and recognisances for the peace and good behaviour. A male offender under sixteen may also or alternatively be whipped (24 & 25 Vict. c. 97, ss. 24, 32, 73; 54 & 55 Vict. c. 69, s. 1). The offences can be tried at Quarter Sessions.

The use of dynamite or any explosive to kill fish in any fishery, public or private, is forbidden (40 & 41 Vict. c. 65, s. 2; 41 & 42 Vict. c. 39, s. 12). See further CRABS AND LOBSTERS; EELS; FISHERIES; OYSTERS; SEA FISHERIES.

Fisheries.

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1. *In Tidal Waters*.—*Primâ facie* a fishery is a right incidental to the ownership of the soil over which the water flows in which that right is exercised; and thus in tidal waters the fishery is presumed to belong to the Crown, and in non-tidal waters to the person (generally the riparian owner) who has the property in the bed of the water (see *Murphy v. Ryan*, 1868, Ir. Rep. 2 C. L. 143). In Lord Hale's words—

The right of fishery in the sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste

whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . . But though the king is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, and (elsewhere he adds) navigable rivers within the tide, yet the common people of England have regularly a liberty of fishing therein as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty. . . .

(Hale, *De Jure Maris*, ch. iv., Moore, *Foreshore*, 376, 377; and so Lord Mansfield, *Carter v. Murcot*, 1768, 4 Burr. 2163).

Prima facie therefore the public have the right to fish over all tidal waters, whether it be for floating fish or fish left on the shore (*Mayor of Orford v. Richardson*, 1791, 4 T. R. 437; 3 R. R. 579; *Chad v. Tilsed*, 1821, 2 B. & B. 403; *Bagott v. Orr*, 1801, 2 Bos. & Pul. 472; 5 R. R. 668; see *FORESHORE*); but this does not extend to waters which though navigable are not tidal, whether a river (*Pearce v. Scotcher*, 1882, 9 Q. B. D. 162, *Dee* above the tidal flow; for "where a river is navigable and tidal the public have a right to fish therein as well as to navigate it, but where it is navigable but not tidal no such right exists," Huddleston, B., *ibid.* 167), or a lake connected with the sea by a narrow river but unaffected by tidal influence, *e.g.* a Norfolk Broad (*Micklethwaite v. Vincent*, 1892, 8 T. L. R. 685); nor to the waters of a river which has been made navigable by Act of Parliament above the tidal flow (*Hargreaves v. Diddams*, 1875, L. R. 10 Q. B. 582, *Itchen* above Southampton). Nor does it justify the public in making use of the shores of tidal waters for all purposes connected with their right of fishing therein (see *FORESHORE*); *e.g.* drying their nets, drawing their boats ashore, etc., except by user implying a grant.

This *prima facie* right of the public to fish in tidal waters may, however, be excluded by a particular individual showing that he has the exclusive right to fish at a particular place within tidal waters; and he may do so either by producing a grant to his predecessors in title from the Crown earlier than the Magna Carta (9 Hen. III.), since when the Crown could not make such a grant, or by proving an immemorial custom or prescription to that effect (*Free Fishers of Whitstable v. Gann*, 1861, 11 C. B. N. S. 387, Williams, J., 417; *Blundell v. Caterall*, 1825, 5 Barn. & Ald. 268, 294, Holroyd, J.).^a To quote Lord Hale again:—

Although the king hath *prima facie* this right (of fishing) in the arms and creeks of the sea, *communi jure* and in common presumption, yet a subject may have such a right; and this he may have in two ways, either by the king's charter or grant, and this is without question. The king may grant the fishing within a creek of the sea, or in some known precinct that hath known bounds, though within the main sea. The second right is that which is acquired or acquirable to a subject by custom or prescription. . . . A subject may by prescription have an interest of fishing in an arm of the sea, in a creek or part of the sea, or in a certain precinct or extent lying in the sea, and there not only free fishing but several fishing. Fishing may be of two kinds ordinarily, viz. fishing with a net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or an interest or propriety of it; or otherwise it is a local fishing that ariseth by or from the propriety of the soil—such are *gurgites*, weares, fishing places, *borachia*, *stachia*, etc., which are the very soil itself, and so frequently agreed in our books. And such as these a subject may have by usage, either in gross, as many religious houses had; or as parcel of or appurtenant to their manors, as both corporations and others have had; and this not only in navigable rivers and arms of the sea, but in creeks and ports and havens, yea and in certain known limits in the open sea contiguous to the shore. And these kinds of fishing are not only for small sea fish, such as herrings, etc., but for great fish as salmons, and not only for them but for royal fish. . . . Most of the precedents touching such rights of fishing in the sea and the arms and creeks thereof belonging by usage to subjects, appear to be by reason of the propriety of the very water and soil wherein the fishing is, and some of them even within parts of the sea (Hale, ch. v., Moore, 384 and 385).

Possession of a private fishery in tidal waters may thus be a franchise, *i.e.* a grant express or implied from the Crown to a subject of the right of exclusive fishery at a particular place, the soil still belonging to the Crown (*Wilson v. Crossfield*, 1885, 1 T. L. R. 601, Morecambe Bay). But the presumption is that in such a case the soil belongs to the owner of the fishery (Lord Herschell, *A.-G. v. Emerson*, [1891] App. Cas. 649, 654, Maplin Sands), and this presumption is strengthened if it be shown that the several fishery has been exercised by means of weirs, kiddles, or engines fixed in the soil of the tidal waters, for, in Hale's words, "they are the very soil" (*ante*); and there is no instance of a grant from the Crown to a subject to fish with fixed engines in waters the soil of which does not belong to the grantee of the fishery (Moore, *Foreshore*, 743). Such weirs and engines fixed in the soil must not, however, interfere with the public right of navigating over that tidal water (see FORESHORE: WEIRS). "A subject may by prescription have a wear in the sea, yet if it be a nuisance to passage of ships it may be abated. . . . By Magna Charta and other statutes weirs that were prejudicial to the passage of ships were to be pulled down (in navigable public rivers), and accordingly it was done in many places. But that did no way disaffirm the propriety, but only removed the annoyance which was not to be allowed in an inland river if it be a common passage. The exception of weirs upon the seacoast (in Magna Charta) makes it appear that there might be such private interests not only in point of liberty but in point of propriety on the seacoast and below low-water mark and in parts of the sea" (Hale, *Admiralty Jurisdiction*; Moore, 283). And Magna Carta, while binding the Crown not to make any fishery several to the exclusion of the public in tidal waters, left untouched all fisheries so erected not later than the reign of Henry II. (*Malcolmsen v. O'Dea*, 1863, 10 H. L. 619, Willes, J.). Instances of fisheries in tidal waters being possessed by private persons and corporations as parcel of manors are very common, and it seems that almost all tidal rivers and estuaries were anciently and are now (where the right is valuable) covered by such several fisheries, which generally extend to the middle of the channel (*usque ad filum aquæ*), as in the Mersey and Dee (Moore, *Foreshore*, 716, 908-915). A private fishery in tidal waters is in almost every case attributable to ownership of the soil, and not to the grant of that particular franchise (Moore, 658); but it may be in gross, *i.e.* independent of any manor, and be in the hands of the Crown (*The Royal Fishery of the River Bann*, 1610, Davis, 55). A subject may reserve part of his fishery to himself (*e.g.* ground fishing), and let the public fish for floating fish (*Rogers v. Allen*, 1808, 1 Camp. 309; 10 R. R. 689). The mere ownership of the soil under tidal waters does not give the owner any right to exclude the public from fishing there, for only possession of a several fishery will do that, but he may fish with weirs or fixed engines, which the public cannot do (Moore, 722).

2. In *non-tidal waters*, for the reason already given, the presumption is that the right of fishery is in the owners of the adjacent land or their grantees, and the public can have no right there. "Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing *usque ad filum aquæ*; and the owners of the other side the right of soil or ownership and fishing into the *filum aquæ* on their side; and if a man be owner of the land on both sides in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees

the common experience" (Hale, ch. i.; and so Bowen, L.J., *Blount v. Layard*, 1888, [1891] 2 Ch. 681, 689; for an instance see *Watwick v. Gonville Caius College*, 1890, 6 T. L. R. 447, river Colne). "There is also a presumption that the owner of the bed of the river has the right to fish in the stream and to prevent other persons from fishing there; but these are presumptions of fact which may be rebutted" (Bowen, L.J., *Blount v. Layard*, 689). Thus a grant of land abutting on a river may not carry with it the right of fishing *usque ad medium filum aquæ*, if made under an Enclosure Act, and the lord of the manor has a several fishery there (*Ecroyd v. Coulthard*, 1897, W. N. 149); and although where the opposite banks are separately owned the owner of each bank cannot fish further than to mid-stream, yet by showing acts of ownership over the whole stream, *i.e.* substantial user of the stream as a whole, though not necessarily in every part of it, the owner of one bank can establish his right to fish the whole stream (Selwyn, *N. P.* 751; *L. A. v. Lord Lovat*, 1880, 5 App. Cas. 273). The fishery may not belong to the owner of either bank; and the person who owns the fishery is presumed, till the contrary be proved, whether he owns the banks or not, to own the bed of the river, subject to the riparian owner having free access to the river (*Hindson v. Ashby*, [1896] 2 Ch. 1; *Marshall v. Ulleswater S. N. C.* 1863, 3 B. & S. 732). The public can acquire no right of fishing in fresh waters by prescription or otherwise, though they may be navigable, for no such right can exist in law (*Hargreaves v. Diddams*, 1875, L. R. 10 Q. B. 582; *Hudson v. Macrae*, 1863, 4 B. & S. 585; *Smith v. Andrews*, [1891] 2 Ch. 678), being a *profit à prendre in alieno solo* (*Wickham v. Hawker*, 1840, 7 Mee. W. 79, Parke, B.), and not enjoyable by custom (*Bland v. Lipscombe*, 1854, 4 El. & Bl. 713 n) or by long possession under the Prescription Act (*Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687). The "dwellers" in a parish cannot acquire a right of fishing in private waters (*Allgood v. Gibson*, 1876, 25 W. R. 60), though commoners within a manor may have it; and uninterrupted enjoyment from time immemorial by the "free inhabitants of ancient tenements" in a borough of a right to dredge for oysters in a fishery belonging to the corporation of that borough on certain days in a year has been held to raise the presumption of that usage being lawful, and of the corporation's ownership of the fishery being conditional on their permission of that usage (*Goodman v. Mayor of Saltash*, 1882, 7 App. Cas. 133); this not being a claim to a *profit à prendre in alieno solo*, but a presumed condition, to which the grant to the corporation was subject. The public cannot use the banks of non-tidal waters for fishing if privately owned, though they may have the right of passage over these banks, as in the case of a towing-path of a navigable river, so with a public bridge (*Blundell v. Caterall*, 1825, 5 Barn. & Ald. 295; 24 R. R. 353; *Lloyd v. Jones*, 1848, 6 C. B. 81; *R. v. Pratt*, 1855, 4 El. & Bl. 860; *Smith v. Andrews*, above). The Crown has no right *de jure* to the soil or the fisheries of an inland non-tidal lake (*Bristow v. Cormican*, 1878, 3 App. Cas. 641, Lough Neagh); and it has been doubted whether the Crown could ever have had as part of its prerogative the exclusive right of fishing in a non-tidal river flowing over the land of a subject, and if it could have such right whether it could grant it to a subject as a franchise (*Duke of Devonshire v. Pattinson*, 1887, 20 Q. B. D. 263).

3. *Different kinds of Fisheries.*— Fisheries have been classified as (1) public, which can only be exercised in tidal waters; (2) several (*separatis*); (3) free (*libera*); and (4) common of piscary (*communis*), which may be enjoyed in tidal or non-tidal waters. The nature of public fishery

has already been considered. A common of piscary has been defined to be "like other commons," and "a right in common with certain other persons in a particular stream" (Dallas, C.J., *Bennet v. Costar*, 1818, 8 Taun. 187), i.e. enjoyable by commoners of a manor to an extent sufficient for the maintenance of their tenements (see MANOR); but they cannot exclude the lord of the manor from fishing except by immemorial special prescription, and have no rights over the soil itself, e.g. they cannot cut the grass growing at the edge of the bank (Woolrych, *Waters*, 127).

A distinction has been made between a several and a free fishery, but the difference, it seems, is only one of words. In one case Lord Holt expressed the opinion that a "several fishery is where he that hath the fishery is owner of the soil, and a free fishery is where a right of fishing is granted to a grantee, and he has the property in the fish" (*Smith v. Kemp*, 1691, Holt, 322); but in a subsequent case he thought that a "separate and free fishery are all one" (*Gipps v. Woollicot*, 7 or 9 Will. III., Holt, 323). It was also held that the owner of a several fishery could bring trespass, while the owner of a free fishery could not (*Child v. Greenhill*, 15 Car. II., Jones W. 440; *Upton v. Dawkin*, 1 & 2 Jac. II., 3 Mod. 97). Lord Mansfield defined a free fishery as a right of fishery which is coextensive with the rights of others (*Seymour v. Courtenay*, 1771, 5 Burr. 2814). Blackstone also distinguished between them by saying that the ownership of the soil covered by the waters is essential to a several fishery, and that a free fishery differs from a several fishery by being confined to a public river, and not necessarily comprehending the soil (iii. 39, 8th ed.); and Woolrych, agreeing with him, thought that a free fishery is only an unlimited common of fishery (126), and so does Paterson (53). On the other hand, Coke says: "A man may prescribe to have a several fishery in such a water, and the owner shall not fish there; but if he claim to have common of fishery or free fishery, the owner of the soil shall fish there" (*Co. Litt.* 122 a); and Hale: "One man may have the river and others the soil adjacent; or one man may have the river and soil thereof and another the free or several fishing in that river" (*De Jure Maris*, ch. i.; Moore, 371); and Bayley, J.: "The presumption that the owner of an exclusive fishery is the owner of the soil only obtains where the terms of the grant are unknown; for, if it appears to convey an incorporeal hereditament only, the presumption is destroyed" (*Duke of Somerset v. Fogwell*, 1825, 5 Barn. & Cress. 886). The idea of a several fishery necessarily implying ownership of the soil was also repudiated in 1845, when the Exchequer Chamber held that "a sole and exclusive fishery" in a grant was equivalent to a several fishery *in alieno solo* (*Holford v. Bailey*, 1846, 8 Q. B. 1000). The following would probably now be accepted as a correct statement of the law: "The only substantial distinction is between an exclusive right of fishery, usually called a 'several,' and sometimes 'free,' as in free warren, and a right in common with others, usually called 'common of fishery,' sometimes 'free,' used as in 'free port.' A several fishery means an exclusive right to fish in a given place either with or without the property in the soil" (*Malcolmsen v. O'Dea*, 1863, 10 H. L. 593; Willes, J., 618, 619). "Free fishery *primâ facie* means several fishery" (Willes, J., *Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687, 697). "Though, for the sake of distinction, it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers by derivation from the Crown, yet it seems as if our law and practice had extended this kind of fishing to all streams private and public" (Hargreave, *Co. Litt.* 122 a). Free and several fishery may accordingly be taken to be the same thing, viz. a right of exclusive fishery (Moore,

Foreshore, 740), sometimes coupled in the latter case with ownership of the soil of the waters. It seems that there is now no difference between the rights and remedies of the owner of a several and those of the owner of a free fishery. Thus the Fresh Water Fisheries Acts allow the owner of a several or private fishery to permit angling during close time (1878, 41 & 42 Vict. c. 39, s. 11 (4)); and the owners of an exclusive fishery can get an injunction and damages against a person who does injury to their fishery, *e.g.* against a person who for building operations takes gravel from near the water of the fishery, in such a way as to make the waters turbid and foul the spawning beds (*Fitzgerald v. Firkbank*, 1897, 13 T. L. R. 390).

The following incidents of an exclusive fishery require notice. A grant of "fishery" *prima facie* gives a several fishery, as being the largest kind known to the law. A grant of soil covered by water *prima facie* includes the fishery therein, and a grant of fishery could carry the soil with it, though this presumption may be rebutted by the circumstances of the grant, *e.g.* where the grant only mentions the fishery, and the particulars of sale say the soil is not to pass (*Ecroyd v. Coulthard*, 1897, W. N. 149). A private fishery is rateable to the poor whether the soil goes with it or not (1874, 37 & 38 Vict. c. 54, s. 3). If a lord of a manor claims a several fishery in water within the manor, he must make out his title to it, and the presumption is that it belongs to owners of adjacent land (*Lamb v. Newbiggin*, 1844, 1 Car. & Kir. 549). An ordinary lease of lands, including water, passes the fishery in that water, in the absence of contrary stipulation. A lease of a several fishery must be by deed, and so must a licence to fish; but if a fishery be let, and no rent agreed upon verbally, the landlord can recover a reasonable rent for use and occupation (*Holford v. Pritchard*, 1849, 3 Ex. Rep. 793; *Paterson*, 67). A fishery will pass as appurtenant to a manor (*Rogers v. Allen*, 1808, 1 Camp. 309; 10 R. R. 689), though it will not pass as appurtenant to pasture (*Edgar v. Special Commissioners of Fisheries*, 1871, 23 L. T. N. S. 732). A several fishery will not pass under a grant of "liberties and usages," nor does it merge on being resumed by the Crown, whether by forfeiture or otherwise (*Duke of Northumberland v. Houghton*, 1870, L. R. 5 Ex. 127). A several fishery can only be granted by deed, and as a consequence of that it cannot be abandoned; and thus, in a case of trespass to a several fishery in a navigable tidal river, evidence that fishing has been carried on by the public with the knowledge of the owners of the several fishery, and without interruption by them as far back as living memory extended, was held ineffectual to take away the right of several fishery, or to confer any right on the public (*Neill v. Duke of Devonshire*, 1882, 8 App. Cas. 135). But besides a "paper title," in order to establish the title to a several fishery, there must be sufficient evidence of possession and enjoyment by the person claiming the several fishery; and accordingly, even where the alleged owner of the fishery produces a perfect or irresistible paper title, acts of user and enjoyment of that fishery by the public, though ineffectual to set up any right in the public to the fishery, are evidence that the several fishery belongs to some other person than the alleged owner, and in such a case it is a question of fact for the jury to decide (and not one of law) whether the alleged owner has made out his title (*Neill v. Duke of Devonshire*, *ante*; *Blount v. Bayard*, 1888, [1891] 2 Ch. 681). A several fishery in a tidal river, the waters of which have permanently receded from one channel and flow in another, cannot be followed from the old to the new channel (*Mayor of Carlisle v. Graham*, 1869, L. R. 4 Ex. 361). The owner of a several fishery may subdivide it, and retain a particular part for himself, *e.g.* an oystery (*Seymour v.*

Courtenay, 1771, 5 Burr. 2814). The owner of a several fishery is entitled to take as many fish as he can, consistently with exercising his right in the usual way and so as not to injure and annihilate the rights of his neighbours, and with complying with the statutory law; and if he owns the soil he may do so by fixed engines or dredging (Paterson, *Fishery Laws*, 1863, 51).

4. *Statutes*.—There are special statutes dealing with fishing in the Severn (1777, 18 Geo. III. c. 33; 1876, 39 & 40 Vict. c. 34; see SEVERN), in the Thames and Medway (*q.v.*) (1728, 2 Geo. II. c. 19, and 1756, 30 Geo. II. c. 21; 1868, 31 & 32 Vict. c. 53), in Norfolk and Suffolk (1877, 40 & 41 Vict. c. xcvi.; 1896, 59 & 60 Vict. c. 18); but the general law relating to salmon and freshwater fish is comprised in the Salmon Acts (*q.v.*) and the Freshwater Fish Acts, 1878, 1884, and 1886 (41 & 42 Vict. c. 39, 47 & 48 Vict. c. 11, and 49 & 50 Vict. c. 2), which extend to all England. The substance of the latter is that arrangements for the protection and management of freshwater fish are made similar to those relating to salmon; and a close time is instituted for all freshwater fish, during which time they may not be bought or sold or killed, with an exception in this last case of so doing by the owner of a several or private fishery or by his permission in his private fishery, or by leave of a board of conservators in a public fishery, or by a person so doing for scientific purposes, or if they are taken for bait, under penalty of not more than £2 fine on first conviction, £5 on second or any subsequent conviction, and forfeiture of the fish so caught, bought, or sold, and, in the discretion of the justices, forfeiture of the instruments used in taking them (1878 Act, s. 11); the use of poison or noxious substances for the destruction of fish is prohibited (1884 Act, s. 7); the Acts are applied to Norfolk and Suffolk (*ibid.* s. 8); and generally the provisions of the Salmon Fisheries Acts (*q.v.*) as to legal proceedings, offences, and penalties apply to those under the Freshwater Fisheries Act of 1878. For the law relating to different kinds of freshwater fish, see under those heads, TROUT, etc.; and for the law relating to sea fisheries, see SEA FISHERIES, and under the different headings of CRABS and LOBSTERS, OYSTERS, etc. For offences under the general law against fishing, see FISH. Officers in the army or marines are forbidden to kill fish without leave in writing from the person entitled to grant such leave, under a penalty of £5 (1878, 41 Vict. c. 10, s. 88, and c. 11, s. 87). A person *bonâ fide* exercising his right of fishery, who does damage to adjoining property, is not liable criminally, though he may be civilly (1861, 24 & 25 Vict. c. 97, s. 52). The property in fish taken unlawfully vests in the taker, and the owner cannot recover them, except in certain cases under the Salmon Acts, though he can their value, unless they are taken from a tank or small pond (Paterson, 85, 86). But the offender can be arrested, unless the offence is angling in the day-time, by any person without a warrant, and taken before a justice (1861, 24 & 25 Vict. c. 96, s. 103). Any person abetting fish poaching, though not liable to apprehension, may be punished summarily in the same way as the offenders themselves (*ibid.* s. 99). See FISH. The supreme authority to administer the Salmon and Freshwater Acts is now the Board of Trade (*q.v.*) (1886, 49 & 50 Vict. c. 39), and the local authority is now the County Councils (1888, 51 & 52 Vict. c. 41, ss. 3 and 38).

[*Authorities*.—Woolrych, *Waters*; Selwyn, *Nisi Prius*, Fishery; Moore, *Foreshore*; Paterson, *Fishery Laws*, 1st ed.]

Fishing Boats.—The Merchant Shipping Act, 1894, has special provisions relating to fishing boats, which may be summarised as follows:—

A fishing boat is defined as a vessel of whatever size and however propelled, employed in sea fishing, but not a vessel used for catching fish otherwise than for profit, except where so expressly provided; a "second hand" of a fishing boat is the person next in authority to the captain or skipper on board; and a fishing "voyage" is a fishing trip from one port to another where the trip ends, but not one whither she returns in distress (s. 370). The tonnage of a fishing boat means her register tonnage, except in the case of trawlers, where it means her gross tonnage (s. 371); and the purview of the Act, except where otherwise expressed, extends only to the United Kingdom, except Scotland (s. 372).

The following provisions apply to all fishing boats:—Every fishing boat in the British Islands, including those used otherwise than for profit, must be registered in the fishing-boat register, and be lettered and numbered and have official papers. If a fishing boat which should be registered is not, she is not entitled to any of the privileges or advantages of a British fishing boat, but she is subject to all the obligations, liabilities, and penalties of such a boat, and to the punishment of offences committed on board her or by persons belonging to her, and the jurisdiction of officers and Courts as if she were registered, and she is liable to a fine of £20 and to be detained every time that she is used as a fishing boat; and regulations may be made by Order in Council for enforcing such registration. Certain sections of the Sea Fisheries Acts, 1868 and 1883 (31 & 32 Vict. c. 45, s. 26, and 46 & 47 Vict. c. 36, ss. 11–14), are applied to this section, while it is saved from the scope of sec. 176 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), which requires boats not belonging to ships to have the name of their owner and port painted on them. Registration of a fishing boat is conclusive evidence that her registered owners at a given date were her owners, and that she is a registered British fishing boat in any proceedings under the Sea Fisheries Acts (*q.v.*) against her owner or skipper, or for recovery of damages for injury done by her, though this does not exclude proceedings against a person beneficially interested in her though not registered, nor does it affect the rights of her owners *inter se* whether registered or not, nor does it otherwise confer, take away, or affect any title to or interest in her (s. 374).

No fishing boat, whether used for profit or not, may go to sea from a port in the United Kingdom, if decked, unless she is supplied with boats proportionately to her tonnage; if she carries more than ten passengers she must also have two lifeboats, and either a properly equipped lifeboat or one of her boats made buoyant like a lifeboat, and these must be always ready for use. If she goes to sea without these accessories, or if any of them are lost or rendered useless by the wilful fault or negligence of the owner or skipper, and they are not replaced by the skipper except for a reasonable cause, or are not always ready for use, the owner if in fault may be fined up to £100, and the skipper if in fault up to £50; and the boat may be detained till she is properly so equipped (s. 375).

Sec. 76 contains a code of punishment, consisting of forfeiture of wages, and imprisonment, whether with or without hard labour, for offences against discipline committed either by seamen or sea-fishing apprentices in fishing boats, including unlawful combination, wilful disobedience, continued breach of duty, assault; and desertion, absence without leave, wrongfully quitting the boat, wilful damage, and smuggling. The skipper, if guilty of any of the latter class of offences, is liable to punishment as if he were a seaman; and sea-fishing apprentices (*q.v.*) and boys, whether ashore or on board, may be punished for any of the former class of

offences. A seaman or apprentice is not relieved, by refusing or neglecting to go to sea, or deserting, from punishment for wilful disobedience, continued breach of duty, or unlawful combination, and may also be punished for deserting or being absent without leave. These criminal provisions do not affect the civil rights of the owner or skipper against offending seamen, though compensation cannot be received more than once for the same damage (s. 377). Forfeitures for desertion are applied first to reimburse the owner's or skipper's consequent expenses, and then go to the Consolidated Fund (s. 378). Deserters and absentees without leave may be sent back to their boat at their own expense, in addition to other punishment (s. 379). Sec. 380 contains the procedure by which seamen charged with certain of the above offences may be arrested and brought before the proper officer, who may be either a superintendent or the principal Board of Trade officer at a port or district, or his deputy; such an officer may inquire into the case, and if the prisoner fail to satisfy him, may order him to return to his boat; if he refuses to obey such order, the officer may have him brought before a Court of summary jurisdiction. A seaman who refuses to go to sea may be taken by the skipper or owner before an officer (s. 381).

The rights and protection of fishing-boat hands are provided for as follows:—A seaman (not a sea-fishing boy) may, when he is ashore, give notice that he means to absent himself if he does so forty-eight hours before he should be on board, and he need not then keep his engagement (s. 382). The wages of a skipper, seaman, or apprentice accrue from day to day; where they are contracted for by the voyage, trip, season, or share, and not by time, the amount accruing is the whole wages for the trip, voyage, season, or share, divided by the number of days taken up till then, but not more than the share of the profits or catch made during the period of actual service (s. 383). But all the wages earned may be forfeited (*ibid.*); and to justify forfeiture and prove desertion, it need only be proved that the offender was duly engaged and belonged to the boat and left her before the end of his engagement, unless by producing a proper certificate of discharge or otherwise he satisfies the Court of the contrary (s. 384).

The skipper must keep a record of deaths, injuries, ill-treatment, punishments, and casualties in his boat, and must produce this if required to any superintendent and send it to the superintendent at the port to which the boat belongs at the times fixed by the Board of Trade, and must report any such occurrence to the superintendent at the port where the voyage ends within twenty-four hours of arrival, under a penalty of £20 (s. 385). The superintendent may inquire into such occurrence, and if it seems to him that it has been caused by improper and violent means, he must report it to the Board and, if necessary, bring the offender to justice and have him arrested. He may indorse the report of it with an expression of his opinion as to its truth or not (s. 386). The superintendent may decide disputes between owners, skippers, and seamen regarding wages or shares in the profits of a voyage, and deductions therefrom; engagements, services, or discharges; and cost, quantity, and quality of provisions; and his decision is final, and if so required by either party it is put into writing, and becomes admissible in evidence, and may be enforced by any justice within whose jurisdiction the person or the goods of the person against whom his decision goes, may be found; and a skipper or seaman may recover any sum so adjudged to him as if it were wages; and for deciding such disputes a superintendent has all the powers of a Board of Trade inspector (s. 387).

Where payment of a skipper or seaman is made by a share in the catch, the owners must render him a full account in a proper form, under penalty of £5; and in case of a dispute the skipper or seaman may inspect at all reasonable times the owners' accounts and books relating thereto, and the owners must produce them under a penalty of £20 (s. 388). Agreements may be made by owners or skippers of British fishing boats fishing off the coast of Scotland for payment of persons employed therein by a share in the profits; they must be made in writing, signed by the parties before a superintendent, who must read, and, if necessary, explain them to the parties, and attest the signature, and certify that he has done so (s. 389). The Board of Trade may fix fees payable on engagements and discharges of crews made before a superintendent, and the latter may refuse to proceed therein till his fee has been paid (s. 390). All superintendents in enforcing any of these provisions, except those relating to the fishing-boat register, are under the control of the Board of Trade (s. 391).

The Act then contains provisions which apply to fishing boats of 25 tons burden and upwards, and regulate the apprenticeship and agreements with boys in the sea-fishing service (see APPRENTICE, SEA).

Special provisions are made for trawlers, and except where otherwise mentioned, these apply only to those of 25 tons and upwards. The skipper of every trawler of that tonnage going to sea from a port in England or Ireland must make an agreement with his crew (not including sea-fishing boys), under penalty of £5 (s. 399; and see APPRENTICE, SEA). This agreement must be in a form approved by the Board of Trade, dated at the time of its first signature, and signed by the skipper before a seaman signs it; it must contain the nature and duration of the voyage or engagement, the number and description of the crew, the time for beginning work, the capacity in which each seaman serves, and his remuneration, and scale of provisions, and also regulations as to conduct on board, fines, allowance of provisions, and punishments for misconduct approved by the Board of Trade and adopted by the parties, who may add stipulations at their will if not contrary to law, with regard to advance and allotment of wages (s. 400). The agreement must be signed by each seaman, and the skipper must have it read over and explained to him and then attest each signature; it must be signed in duplicate when the crew is first engaged, one part being kept by the superintendent at the port of departure, and the other by the skipper, with a special place for signatures of substitutes or subsequently engaged persons, and the same procedure must be followed with these latter as above, and, if possible, before they go to sea (s. 401). Agreements may be made by the owner or registered managing owner instead of the skipper, in the same way as by the skipper; and for service in one particular boat or in two or more boats, provided in this latter case that their names are specified, as well as the rates, periods, and methods of payment (s. 402). Running agreements may be made, extending over two or more voyages, if these average less than six months in duration, but not beyond the next June 30 or December 31 or first arrival in the United Kingdom after that date or consequent discharge of cargo (s. 403). On every return to a port in the United Kingdom before final termination of such an agreement, the agreement must be indorsed by the skipper, with the engagements and discharges made or to be made before leaving port, under a penalty of £5 for a false statement (s. 404). Within forty-eight hours of a trawler's departure from port, the owner or managing owner,—or if they go to sea in her, then their agent,—must make a report to the port superintendent of the crew who have sailed in her, under a penalty of

£5 (s. 405); and any change in the crew under a running agreement must be stated by the skipper to the nearest superintendent, under a like penalty (s. 406); but they may be exempted from these duties by the Board of Trade. Any alteration in an agreement, except additions for substitutes and subsequently engaged persons, is inoperative, unless made with the consent of all persons interested therein (s. 407); and a skipper who fraudulently alters or makes a false entry in, or false copy of, an agreement, or is privy thereto, is liable to a fine of £20 for such offence (s. 408).

The owner and skipper of a trawler must give to the skipper and the crew respectively an account of his and their wages, with the deductions therefrom (and no deduction is allowable, unless so included or being in respect of a matter happening after such delivery, not less than four hours before paying off, under a penalty of £5, but this may be dispensed with by notice to that effect from the person entitled to it (s. 409). The skipper must give a certificate of discharge to a seaman discharged, stating the period of service and the time and place of discharge, under a £5 penalty (s. 410); and seamen improperly discharged before the voyage begins or ends are entitled to compensation, besides the wages earned (s. 411). All agreements come under these provisions as to discharge and payment of wages (s. 412).

Skippers and second hands of trawlers (of and above 25 tons) sailing from any port in England or Ireland must hold certificates of competency, or the owner is liable to a fine of £20; and any persons so serving without certificate or employing an uncertificated person, except in case of necessity, are liable to a £20 fine; but where a skipper is absent from his boat a superintendent may, at the request of the owner and on being satisfied that he is unavoidably absent, authorise the second hand to act for a time, not exceeding a month, as skipper, and for that time he is a duly certificated skipper (s. 413). Certificates of competency are granted by the Board of Trade to skippers and second hands of fishing boats in a similar way and under similar conditions (as to examination of applicants, granting, suspending, and cancelling certificates, and inquiries into the conduct of their holders), and have a similar effect to those granted to masters and mates of ships; and a certificate of competency as skipper cannot be granted to any person unless he has previously held a second hand's certificate for twelve months (s. 414). Certificates of service are granted to persons who have served for not less than twelve months as skippers before September 1, 1883, or as second hands before July 1, 1888, limited to a particular class of boats if they have been exclusively employed in that class, and subject to their showing to the Board their general good conduct in the boats where they have served. Such certificates contain particulars of name, place, and date of birth of the holder, and the length and nature of his previous service, and are subject to the same conditions as certificates of competency (s. 415). A register of certificated skippers and second hands may be kept by the Board of Trade, the entries in which are evidence of facts they state (s. 416). The Board may also, on application from (among others) persons in command of a fleet of fishing boats, make regulations as to the conveyance of fish from trawlers to vessels engaged in taking it to port, so as to prevent loss of life and danger to life and limb; such regulations must be laid before Parliament for approval, and a breach of them involves a penalty of £10 (s. 417).

For the law relating to the liabilities of fishing boats in collision and salvage, see those heads; for the law as to sea fisheries, see SEA FISHERIES.

Fish, Royal.—These are whale and sturgeon according to the Statute of 1324 (17 Edw. II. c. 11), and the opinion of Sir Leoline Jenkins (*Life*, i. 89); but Hale adds porpoises, and these are also mentioned in *Sir Henry Constable's* case (1599, 5 Co. Rep. 106; *De Jure Maris*, ch. vii.; Moore, 412). They belong to the Crown as a royal franchise when taken within the seas that are part of the realm, but not if on the high seas, when they belong to the person who takes them. A subject may have them by grant from the Crown, e.g. the Lord Warden if taken within the limits of the Cinque Ports (*Lord Warden and Admiral of Cinque Ports v. King in Office of Admiralty*, 1831, 2 Hag. Adm. 438), or by prescription, and either in gross or appurtenant to an honour, manor, or hundred (Hale, *De Jure Maris*, ch. vii.; Moore, *Foreshore*, 413). A custom is mentioned of the king taking the whole sturgeon, but only the head of the whale, while the Queen took the tail; and so it appears in ancient records, e.g. the Quo Warranto Rolls (Moore, *Foreshore*, 81–84). The right to royal fish in a seacoast manor is a presumption that the foreshore belongs to the lord of the manor (see **FORESHORE**); and it may pass under a grant of wreck (Moore, 83).

Fit.—Fitness to execute an office, it is said, involves three requisites—honesty, knowledge, and ability. See Dwarria, *Stat.* 685, and Stroud, *Jud. Dict.*, s.v. “Fit.”

Fixed Period.—As to meaning of in regard to apportionment of rent and income, see **APPORTIONMENT**, vol. i. at p. 288; and in regard to apportionment of dividends, see *In re Maxwell*, 1863, 32 L. J. Ch. 333, and Stroud, *Jud. Dict.*, s.v. “Fixed Period.”

Fixtures.

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Under the old common law rule, all personal chattels, when once annexed to the inheritance or freehold, became, as fixtures, a part of the realty itself, and were subject to the rules of law governing it, and therefore irremovable by tenants or others from the freehold, unless by the freeholder's consent (Amos and Ferard on *Fixtures*, 3rd ed., Introduction *Broom's Legal Maxims*, 6th ed., p. 376; *Bain v. Brand*, 1876, 1 App. Cas. 762, at p. 767). The multiplicity of particular interests which grew out of the fee-simple of real estate, and the modern requirements of society—particularly as regards trade and agriculture—necessitated a gradual relaxation and modification of this general rule by the Courts, and, later on, by the Legislature; so that although the old rule still prevails in principle—in favour of the inheritance—yet it has been made subject to numerous alterations and exceptions. The reasons for this relaxation of the law at

summed up by Martin, B. in the case of *Elliott v. Bishop* (1854, 10 Ex. Rep. 496, at pp. 507, 508) thus:—

"The old rule laid down in the old books is, that if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being *Quicquid plantatur solo, solo cedit*. But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable or expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee-simple by the mere act of annexation became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of law and equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated *fixtures*."

Agreeably to the above dictum, a definition of fixtures which has been adopted in some, but by no means all, of the authorities is as follows:—
"Fixtures are personal chattels which have been annexed to land so as to become part of it, but which may be afterwards severed and removed by the person who has annexed them, or his personal representative, against the will of the owner of the freehold" (Amos and Ferard, p. 2; *Hallen v. Runder*, 1834, 1 C. M. & R. 266, at p. 276; *Ex parte Barclay*, 1855, 5 De G., M. & G. 403, at p. 410). There seems, however, to be no special advantage in limiting the use of the word to what are commonly known as tenant's (as distinguished from landlord's) fixtures, and in the present article the word will be applied indiscriminately to all chattels, whether removable or not, which have been united to the freehold in such a way as, in contemplation of law, to become part of it (see Wharton's *Law Dict. s.r.*).

In the first place, to constitute a fixture some mode of actual annexation, or affixing to the land or to a building which forms part of the land, is essential; a mere laying upon the land of a chattel will not alter its character as such.

For instance, a barn laid upon blocks of timber, but not fixed to the ground itself, has been held not to be a fixture (see *Elwes v. Maw*, 1802, 3 East, 38, at p. 55; 6 R. R. 523).

In another case some distillery stills were set in brickwork and let into the ground, and certain vats were merely laid upon the brickwork and timber, and the Court distinguishing between them held the former to be fixtures, but the latter to be mere chattels not fixed to the freehold (*Horn v. Baker*, 1808, 9 East, 215; 9 R. R. 541). A number of similar cases, which vary only in detail, establish the general principle that where things are not in fact affixed to the freehold, but are merely laid upon foundations of some sort, or upon the soil itself, they are not fixtures at all but mere chattels (*Wansbrough v. Maton*, 1836, 4 Ad. & E. 884; Amos and Ferard, ch. i. pp. 3-9). And neither the circumstance that the article has been placed in a special bed or receptacle fixed in the soil (*Ex parte Astbury*, 1869, L. R. 4 Ch. 630), nor that subsequently to its erection it sinks into the soil (*Duke of Beaufort v. Bates*, 1862, 3 De G., F. & J. 381, at p. 390; *Wood v. Hewett*, 1846, 8 Q. B. 913), necessarily makes any difference.

The question whether a chattel when annexed becomes a fixture, or retains its original character, is one of fact, to be gathered from the circumstances of each particular case, and depending mainly upon the mode and degree of annexation to the soil or fabric of the freehold, and the purpose

or object of such annexation; whether the article can be detached and removed *intégrè, salvè, et commodè*, or not without injury to itself or to the freehold, is, consequently, a matter of great importance (see per Parke, B., in *Hellawell v. Eastwood*, 1851, 6 Ex. Rep. 295, at pp. 311, 312). But though the intention with which an article has been annexed is important as showing the "object" of the annexation, it is material only so far as it can be gathered from the mode and object of that annexation themselves, which are patent for all to see, and not, for instance, from the circumstances of a chance agreement that might or might not exist between the owner and the hirer of a chattel (*Hobson v. Gorringe*, [1897] 1 Ch. 182, at p. 193).

The bricks of a building, and the paper upon the internal walls, are clearly irremovable fixtures, both from the mode and degree, and from the permanent purpose of their annexation (see *Parsons v. Hind*, 1866, 14 W. R. 860, per Blackburn, J.; *Whitehead v. Bennett*, 1857, 27 L. J. Ch. 474; *D'Eyncourt v. Gregory*, 1886, L. R. 3 Eq. 382). On the other hand, pictures hung upon the walls of a house, and carpets nailed to the floors, are obviously—from the temporary nature and purpose of their fixing—chattels merely; but doors and windows are of such a permanent nature as to be irremovable, these being essential to the convenient use of the freehold (see *Chimie v. Wood*, 1869, L. R. 4 Ex. 328; *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328, at p. 335).

There are several more complex cases, in which spinning machines and hydraulic presses, being but slightly affixed, and not meant for the purpose of permanently improving the inheritance, have been held to be chattels; and others where engines, looms, and machinery, having been more permanently and completely affixed, have been held to be fixtures; these will be found considered and discussed at length in *Longbottom v. Berry*, 1869, L. R. 5 Q. B. 123; *Holland v. Hodgson*, 1872, L. R. 7 C. P. 328; see per Blackburn, J., at pp. 334, 335, in which clear distinctions are drawn between what constitutes a permanent and what constitutes a temporary annexation.

It appears from these authorities and from *Chidley v. The Churchwardens of West Ham*, 1874, 32 L. T. 486, that it is difficult to lay down any rule or principle of universal application upon the question of annexation, but that each case must be judged according to its special circumstances. A rule, however, of some generality seems to be that "articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel" (per Blackburn, J., *Holland v. Hodgson*, *supra*).

An apparent exception to the general rules for determining what constitute fixtures occurs in the case of certain chattels, which, although not in any way attached to the freehold, nevertheless are in contemplation of the law, or constructively, regarded as fixtures, because they belong to the freehold and are essential to its use and enjoyment, *e.g.* the keys of the house, the stones of a dry wall, and the detached or duplicate portions of machines, which themselves are affixed to the freehold (*Moody v. Steggles*, 1879, 12 Ch. D. 261, per Fry, J., at p. 267; *Bain v. Brand*, 1876, 1 App. Cas. 762; *Holland v. Hodgson*, 1872, L. R. 7 C. P. at p. 335; *Ex parte Astbury*, 1869,

L. R. 4 Ch. 630; *Sheffield, etc., Building Society v. Harrison*, 1884, 15 Q. B. D. 358). Similarly it has been laid down that whatever articles are essentially part of a house (although but imperfectly attached) so that they cannot be removed without depriving the building of that which was intended to be used with it—a gaselier, for instance—ought to be regarded as fixtures (*Smith v. Maelure*, 1884, 32 W. R. 459).

Having explained what fixtures are, and how they are distinguished from articles resembling them in character, but which are really chattels, the next thing is to treat of the removability of fixtures, that is to say (going back to our definition) of articles which are not chattels but which have been attached to the freehold so as to become part of it. For this purpose fixtures are of three kinds, as relating to (1) trade, (2) ornament or domestic convenience, (3) agriculture.

Moreover, there are three different classes of persons with reference to whom these three kinds of fixtures have to be regarded, inasmuch as different considerations, as will be shown in the sequel, will apply—

(a) As between the executor and the heir of the owner in fee;

(b) As between the executor of a tenant for life or in tail and the remainderman or reversioner;

(c) As between a tenant and his landlord.

There is no question that as regards the power of removing fixtures the most favoured class is the ordinary tenant, and the least favoured the executor of an owner in fee (see *Norton v. Dushwood*, [1896] 2 Ch. 497, per Chitty, J.). Consequently, any decision in favour of the executor of an owner in fee will apply to the executor of a tenant for life, and, *a fortiori*, to the ordinary tenant. On the other hand, decisions (against the removability of fixtures) in favour of the ordinary landlord will as a necessary consequence apply to the remainderman, and still more strongly to the heir of an owner in fee.

By keeping this observation in view a good deal of repetition can be avoided.

I. *Trade Fixtures*.—(a) As between the executor of the owner in fee and the heir, it seems perfectly clear, since the decision of the House of Lords in *Bain v. Brand*, 1876, 1 App. Cas. 762, coupled with the earlier cases of *Fisher v. Dixon*, 1845, 12 Cl. & Fin. 312, and *Lawton v. Salmon*, 1781, 1 Black. H. 259 n., that there is no right in the executor to remove trade fixtures set up for the benefit of the inheritance. Where, for example, the freehold consists of mining property, colliery plant erected for its proper working would fall within the rule. But it seems to have been left to a certain extent an open question as to whether fixtures set up for some collateral purpose, and not as a mere means to the better enjoyment of the inheritance, might not be removable by the executor. Fixtures erected merely as an accessory to the carrying on of some particular trade, *e.g.* that of a brewery, to the use of which the land was chosen by the owner to be put, furnishes an instance in point. It has been said that a careful consideration of the grounds upon which the decisions in the above cases were based seems to lead to the conclusion that the heir is in all cases entitled to trade fixtures whether they have been annexed for the mere purpose of more profitably enjoying the land, or used for a purpose collateral to and independent of its enjoyment (*Amos and Ferard*, pp. 237, 238). But Lord Blackburn appears to have thought that there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir, and, following a dictum of Lord Ellenborough in

Elwes v. Maw, 3 East, at p. 53, that those cases may be considered as decided mainly on the ground that when the fixture was an accessory to a matter of a personal nature, then it should be itself considered as personalty (*Wake v. Hall*, 1883, 8 App. Cas. 195, at p. 204). With the exception, however, of one unreported case at *Nisi Prius* (generally known as the *Cider-Mill* case, referred to in 3 Atk. at p. 16) there is, in spite of the above remarks, no known decision where trade fixtures of any kind have been held removable as between executor and heir.

(b) As between the personal representative of the tenant for life or the tenant in tail and the remainderman or reversioner, the old strict rule—as to the irremovability of trade fixtures from the inheritance—has been considerably modified; and, as will be seen from the class of decisions now to be considered, fixtures set up or erected for trade purposes are generally removable as personal estate which passes to the executor.

The first of these decisions is that of *Lawton v. Lawton* (1743, 3 Atk. 13), in which a fire-engine set up by a tenant for life for the benefit of carrying on the trade of a colliery was held by Lord Hardwicke to be personal estate and to belong to the executor, upon the ground that it was for the public benefit to encourage tenants for life to do what is advantageous to the estate during their term.

This furnishes also an instance, of which there are several in the books, of what Lord Hardwicke calls a “mixed case between enjoying the profits of the land and carrying on a species of trade”; and this circumstance formed an additional ground for the decision.

This case was followed by *Dudley (Lord) v. Warde* (1751, Amb. 113), in which the executor of a tenant for life similarly claimed to remove fire-engines erected in a colliery as personal estate; and Lord Hardwicke again held, upon the ground of “benefit of trade,” and that “a colliery is not only an enjoyment of the estate, but in part carrying on of trade,” and also that “a man would not erect such an engine, at a vast expense, unless it would go to his family,” that these fixtures should go as assets to the executor.

These decisions have been confirmed in many subsequent cases, and notably in those of *Lawton v. Salmon*, 1781, 1 Black. H. 259 n.; 2 R. R. 764; *Penton v. Robart*, 1801, 2 East, 88; 6 R. R. 376; *Elwes v. Maw*, 1802, 3 East, 38, at p. 51; 6 R. R. 523; and *Bain v. Brand*, 1876, 1 App. Cas. 762, at p. 776. In the foregoing decisions and dicta, it should be remembered that the fixtures claimed were held to be personal estate, because they were erected for the double object, or combined purposes, of trade and of better enjoying the profits of the realty; and it follows from them that executors as against the persons in remainder are entitled not only to what are purely trade fixtures, but also to those used for the mixed purposes of trade and the profits of land.

It may be mentioned here that, having regard to the above authorities, a dictum of Lindley, L.J., in *Gough v. Wood* ([1894] 1 Q. B. 713, at p. 719) appears to be too wide in saying that “the ordinary doctrine relating to trade fixtures . . . only applies as between landlord and tenant,” because as has been seen, it clearly applies also as between the legal personal representative of a tenant for life or in tail and the remainderman or reversioner.

(c) As between landlord and tenant, the greatest degree of latitude is allowed to the latter in respect of trade fixtures, which are always removable by him, except when he otherwise contracts with his landlord so as either wholly or in part to deprive himself of this privilege. The question will be considered now apart from any such agreement, whether contained in the demise or otherwise, and merely upon the relation of landlord and

tenant, the consideration of the effect of particular contracts being left to a later stage.

The basis and object of the modification of the general rule in favour of tenants, as against their landlords, is the promotion of trade and manufacture for the public benefit. This principle, which gives tenants an indisputable right to remove trade fixtures, runs through all the judicial dicta and decisions from the earliest to those of recent date (*Pool's case*, 1703, 1 Salk. 368; *Lawton v. Lawton*, 1743, 3 Atk. 13; *Dudley v. Warde*, 1751, Amb. 113; *Lawton v. Salmon*, 1781, 1 Black. H. 260 n.; 2 R. R. 764; *Penton v. Robart*, 1801, 2 East, 88; 6 R. R. 376; *Elves v. Mau*, 1802, 3 East, 38; 6 R. R. 523; 2 Sm. L. C. 183, 10th ed.; *Gibson v. Hammersmith Rwy. Co.*, 1862, 32 L. J. Ch. 337 and at p. 341; *Senders v. Davis*, 1885, 15 Q. B. D. 218).

Trade fixtures may comprise either articles which before they became affixed to the freehold were in the nature of perfect and complete chattels, such as machinery, engines, or vessels; or they may be buildings or other erections which are of a more or less substantial and permanent character. Generally speaking, tenants may remove all fixtures of the former class, and such of the latter as are merely accessory to the use of these; e.g. fire-engines belonging to collieries (in *Lawton v. Lawton*, and *Dudley v. Warde*, *supra*); salt pans fixed to a brick floor with furnaces under them (in *Lawton v. Salmon*, *supra*); steam-engines and boilers (in *Clunie v. Wood*, 1869, L. R. 4 Ex. 328); and Dutch barns or sheds made of uprights rising from a brick foundation (as in *Dean v. Allalley*, 1798, 3 Esp. 11); and even a building and chimney erected upon a brick foundation let into the ground for the manufacture of varnish (as in *Penton v. Robart*, 1801, 2 East, 88; 6 R. R. 376). This last, however, must be regarded as a decision not to be extended, for according to the true interpretation of the doctrine, a tenant cannot remove a permanent and substantial building as being a trade fixture; though where a building is merely temporary, and accessory to some removable article, it is itself removable together with such article (*Whitehead v. Bennett*, 1858, 27 L. J. Ch. 474). And a building and machinery which were intended and used merely as accessory to mining operations, and which were not intended to be annexed irrevocably to the soil, have been held to be removable (*Wake v. Hall*, 1880, 7 Q. B. D. 295, per Lord Selborne, L.C., at p. 301; 8 App. Cas. 195).

Upon the same principle upon which trade fixtures are removable, nurserymen and market gardeners also may remove trees and shrubs, and even fruit-trees in full bearing if planted by them in the way of their trade, so as to form part of their stock-in-trade, the reason being that these products are accessory to the carrying on of these particular trades (see *Wyndham v. Way*, 1812, 4 Taun. 316; 13 R. R. 607; *Empson v. Soden*, 1833, 4 Barn. & Adol. 655; *Wardell v. Usher*, 1841, 3 Sco. N. R. 508; *Oakley v. Monck*, 1866, L. R. 1 Ex. 159).

Market gardeners are now, moreover, entitled to the further privileges conferred by the Agricultural Holdings Act, 1883 (see s. 54), which has been extended, as to improvements executed in or upon their premises, by the Market Gardeners Compensation Act (58 & 59 Vict. c. 27, s. 3). The effect of this last enactment is to entitle market gardeners to remove glass-houses and other buildings erected by them for purposes of their trade, in the same way and subject to the same conditions (see as to this, *infra*) as tenants under the Agricultural Holdings Act. Before it was passed the point may be said to have been involved in some doubt.

A condition or qualification subject only to which trade fixtures are

removable, is that such removal should be effected without material damage to the freehold (see *Gibson v. Hammersmith Rwy. Co.*, 1862, 2 Drew. & Sm. at p. 608), and without destruction of the fixture itself (Amos and Ferard, 65, 70); but it does not signify that a chattel, or machine, has to be taken to pieces in order to remove it, if it is capable of being put together, and set up again elsewhere (*Whitehead v. Bennett*, 1858, 27 L. J. Ch. 474).

Another important consideration in deciding upon the removability of fixtures is local custom or trade usage, which in conformity with established principle may become annexed to, or an implied term of, the contract of tenancy (see *Culling v. Tuffnal*, 1694, Bull. N. P. 34; *Watherell v. Howells*, 1808, 1 Camp. 227; *Davis v. Jones*, 1818, 2 Barn. & Ald. 165; 20 R. R. 396; *Longbottom v. Berry*, 1869, L. R. 5 Q. B. 123, at p. 126; *Wake v. Hall*, 1880, 8 App. Cas. 195).

The foregoing results have been tersely summarised as follows:—

Things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him, whenever the removal is not contrary to any prevailing practice; where the articles can be removed without causing material injury to the estate; and where, in themselves, they were of a perfect chattel nature before they were put up, or at least have in substance that character independently of their union with the soil; or, in other words, where they may be removed without being entirely demolished or losing their essential character or value (Amos and Ferard, 72).

II. *Fixtures of Ornament and Convenience*.—As between the heir and executor the relaxation of the general rule upon the ground of articles having been temporarily affixed to the freehold for the purposes of ornament or convenience seems to have been first given expression to in the case of *Squier v. Mayer*, 1701, 2 Freem. 249, in which it was held, as between the executor and the heir of a deceased owner, that a furnace fixed to the freehold, and hangings nailed to the walls, as being respectively for convenience and ornament, should go to the executor like personality. This case was somewhat qualified by the decision in *Cave v. Cave*, 1705, 2 Vern. 508; but it was fully confirmed by *Beck v. Rebow*, 1706, 1 P. Wms. 94, in which hangings and looking-glasses fixed to walls of a house were held, though fixed by nails and screws, not to be part of the freehold. Another instance is furnished by *Harvey v. Harvey*, 1740, 2 Stra. 1141, in which it was held that hangings, tapestry, and iron backs to chimneys also belonged to the executor as against the heir.

The doctrine of removability, however, as between the executor and the heir, set up in the earlier cases above mentioned, has been considerably cut down by later authorities, and notably by the dicta and decisions in *Lawton v. Salmon*, 1781, 1 Black. H. 260 n.; 2 R. R. 764; *Elwes v. Maw*, 1802, 3 East, at p. 53; *Winn v. Ingilby*, 1822, 5 Barn. & Ald. 625; 24 R. R. 503; *Colegrave v. Dias Santos*, 1823, 2 Barn. & Cress. 76; *R. v. St. Dunstan's*, 1824, 4 Barn. & Cress. 686; so that the result seems to be that there is only a very limited relaxation, in favour of the executor as against the heir, of the old rule preventing removal, and that considerable uncertainty exists as to how far the rule may now be regarded as modified. On this point *Norton v. Dashwood* ([1896] 2 Ch. 497), which will be considered later in dealing with devisees, may be referred to as a very modern authority.

With regard to fixtures set up by way of ornament or convenience by tenants for life or in tail, the case of *D'Eyncourt v. Gregory* (1866, L. R. 3 Eq. 382) is the principal authority.

Inasmuch as this class of fixtures has been considered as forming part

of the personal estate of a deceased owner in fee, it is to be inferred that these would pass also, to at least a corresponding extent, to the personal representative of tenants for life or in tail, as against the remainderman or reversioner; but as far as this depends upon the decisions between the executor and heir, which have been discussed already, the privilege cannot be said to be carried to any great extent.

In *D'Eyncourt v. Gregory*, the fixtures in dispute were, in point of fact, claimed by the representatives of a tenant for life on the one hand and the remainderman on the other; and they comprised:—tapestries stretched on wood which was screwed and nailed to wooden plugs in the brick walls of a mansion-house; painted wood mouldings; a picture fixed in a panel by screws or nails; carved and gilt frames filled with satin, also nailed or screwed to a wall; a chimney-glass in a frame, with an oil painting surmounting it fixed with nails or screws; figures and vases upon pedestals, which were not fixed and stood by their own weight; stone figures of animals, which also rested on the ground by their own weight only; and ornamental garden seats slightly let into the soil; all of which were capable of removal without material injury to the freehold. Lord Romilly, M. R., however, held that, with the exception of the chimney-glass and the oil painting surmounting it, none of the articles above mentioned could be removed by the person claiming under the tenant for life, because they were either essential portions of the house or formed part of its architectural design. The question, he says, in such cases is "not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it"; nor whether the articles rest by their own weight, "but whether they are strictly and properly part of the architectural design."

The only articles held removable in this case were mere chattels; but it also seems a probable conclusion that any fixtures which were not essential to the house, i.e. which could have been removed without the necessity of substituting others in their place (e.g. a gaselier), would have been covered by the decision, and that to this extent it is an authority in favour of the personal representative (Amos and Ferard, 183, 184).

Following the doctrine of *D'Eyncourt v. Gregory*, it has been held by Stirling, J., that statues and vases specially designed for an ornamental garden and placed upon piers "with the view to the enjoyment of the land as a garden, and not with a view to the enjoyment of the various articles considered as objects of art," were annexed to and formed part of the land (*Bulkeley v. Lyne Stephens*, 1895, 11 T. L. R. 564).

The decision in the most recent case on fixtures which belongs to this branch of the subject is obviously in no way inconsistent with the principles laid down by Lord Romilly. In this case it has been held by the Court of Appeal that a museum which formed part of a tenant for life's mansion-house, and contained an old collection of stuffed birds attached to movable wooden trays placed in iron glass-fronted cases affixed to the walls, was not to be regarded as a fixture, or as annexed to the freehold, but that it passed as personal chattels to a trustee in bankruptcy of the tenant for life (*Hill (Lord) v. Bullock*, [1897] 2 Ch. 482).

It may be added here that the rights with regard to fixtures of ornament or convenience erected by persons holding ecclesiastical benefices, as between their executors and the successor in the benefice, have usually been regarded as to a certain extent on the same footing as those with regard to fixtures erected by tenants for life. But inasmuch as an incumbent has at no time any reversioner with present interests or rights, while,

when the tenant for life annexes anything to the freehold he annexes to that in which some other person has an existing interest which may be increased or decreased in value by what he does, the rights of removing fixtures possessed by the executors of an incumbent are larger than those possessed by the executors of an ordinary tenant for life (*Martin v. Roe*, 1857, 7 El. & Bl. 237). See also *Huntley v. Russell*, 1849, 13 Q. B. 572, where, however, the articles in dispute, though in the nature of fixtures, were held to be really chattels.

As between landlord and tenant, fixtures set up by the latter at his own expense for ornament and convenience are generally removable. This has been laid down in a series of judicial decisions, of which those already discussed, as relating to the executor and the heir, and the legal personal representatives of tenants for life, form only a portion, applicable, in conformity with the principle already mentioned, when removability has been established. Others will now be referred to which have arisen exclusively as between ordinary tenants and their landlords.

The principle of the relaxation in favour of the ordinary tenant seems to be the temporary nature and purposes of the annexations coming within this exemption, and the inconvenience which would result if every article attached to the freehold by a tenant were to be considered for that reason the reversioner's property (*Amos and Ferard*, 116).

And it will be observed upon an examination of the decisions referred to that the relaxation in nearly all instances is specifically based upon the fact of the attachment being for ornament or convenience.

In order to be removable as between a tenant and his landlord—and the same thing applies in both the other classes of cases—the articles affixed must be perfect chattels in themselves, and mere substitutes for loose furniture; and in no case has the privilege been extended as with trade fixtures (see *ante*) and agricultural fixtures (see *post*) to anything in the nature of erections or buildings, however temporary they may be in purpose or character (*Amos and Ferard*, 117). These annexations to be removable must be somewhat slightly and temporarily attached, and severable without doing any substantial injury to the freehold (*Grymes v. Beweren*, 1830, 6 Bing. 437, 440; 31 R. R. 460; *Holland v. Hodgson*, 1872 L. R. 7 C. P. 333; *Jenkins v. Gething*, 1862, 2 John. & H. 520; *Gibson v. Hammersmith Rwy. Co.*, 1862, 32 L. J. Ch. 337; *Buckland v. Butterfield* 1820, 4 Moore, 440; 22 R. R. 649; *Avery v. Cheslyn*, 1835, 3 Ad. & E. 75 *Ex parte Barclay*, 1855, 5 De G., M. & G. 403, 410; *Martin v. Roe*, 1857 7 El. & Bl. 237, 244).

It will be gathered from a study of the above authorities that there is considerable uncertainty as to the degree or extent to which annexation to the freehold is allowable consistently with the right of removal, and that each case must be judged according to its own special circumstances. It is clear, however, from them (and see *Lawton v. Salmon*, 1 Black. H. 260 n.) that in the removal of ornamental fixtures—and the same thing applies to those affixed for purposes of trade—a tenant must leave the premises in the same state as that in which he finds them, and that it must be done without material injury thereto. But it must be borne in mind that a tenant's right of removal is less extensive here than in the case of trade fixtures (*Amos and Ferard*, 124). It has been said, moreover, "to have been general understood in practice" (*ibid.*) in either case, that if any injury is occasioned to the premises in removal, compensation must be given to the landlord if the loss he may sustain (see as to this principle, *Agricultural Holdings Act* 1883, s. 34; *Foley v. Addenbrooke*, 1844, 13 Mee. & W. 174).

Instances of fixtures removable by tenants under this head are the following:—(1) Ornamental or decorative articles—hangings and tapestry, chimney-pieces, pier and looking glasses, cornices, marble slabs, window blinds, and wainscot screwed or nailed to walls (*Squier v. Mayer*, 1701, 2 Freem. 249; *Beck v. Rebou*, 1706, 1 P. Wms. 94; *Allen v. Allen*, 1728, Mos. 112; *Harvey v. Harvey*, 1740, 2 Stra. 1141; *Ex parte Quincy*, 1750, 1 Atk. 477; *Buckland v. Butterfield*, 1820, 4 Moore, 440; *Grymes v. Boweren*, 1830, 6 Bing. 437; 31 R. R. 460; *Avery v. Cheslyn*, 1835, 3 Ad. & E. 75; *Leach v. Thomas*, 1835, 7 Car. & P. 327; *Bishop v. Elliott*, 1855, 11 Ex. Rep. 113; *Sanders v. Davis*, 1885, 15 Q. B. D. 218. (2) Articles for domestic use and convenience—pumps, grates and stoves fixed to brickwork, chimney backs, coppers and furnaces, ranges and ovens, mash and water tubs, rails, fences and hurdles, bookcases and fixed tables, fixed cupboards, counters, shelves and partitions, gasfittings and bells (*Squier v. Mayer*, 1701, *supra*; *Harvey v. Harvey*, 1740, *supra*; *Fitzherbert v. Shaw*, 1789, 1 Black. H. 258; *Winn v. Ingilby*, 1822, 5 Barn. & Ald. 625; 24 R. R. 503; *Colegrave v. Dias Santos*, 1823, 2 Barn. & Cress. 76; *R. v. S. Dunstan's*, 1825, 4 Barn. & Cress. 686; *Grymes v. Boweren*, *supra*; *Beck v. Dawson*, 1834, 2 Ad. & E. 37; *Darby v. Harris*, 1841, 1 Q. B. 895; *R. v. Lee*, 1866, L. R. 1 Q. B. 254; *Sanders v. Davis*, *supra*).

III. *Agricultural Fixtures*.—The question of removability of agricultural fixtures only arises in the relationship of landlord and tenant; as between heir and executor, or between the legal personal representative of a tenant for life and the remainderman, such fixtures are never removable. The privilege obtained by tenants from the decisions of the Courts enabling them to remove the different kinds of fixtures before considered did not extend to those affixed, or erected, for the purposes of agriculture,—unless their real purpose could be shown to be accessory to some trade apart from agriculture. An unqualified rule excluding agricultural tenants from participation in the advantages possessed by tenants in trade as to removing their fixtures was laid down in *Elwes v. Maw*, 1802, 3 East, 38; 6 R. R. 523. Statutory reforms were therefore called in aid to remedy this hardship, and by the Landlord and Tenant Act, 1851. (14 & 15 Vict. c. 25, s. 3), it was provided that where any agricultural tenant erects, *with his landlord's consent in writing*, at his own expense, and not in pursuance of some obligation in that behalf, “any farm building either detached or otherwise,” or “any other building, engine, or machinery,” either for agricultural purposes or for those of trade and agriculture, it should become the tenant's own property and be removable by him, notwithstanding that it were permanently fixed to the soil or consist of separate buildings, provided the tenant making any such removal should not injure the freehold, or provided he put it in the same condition as it was in before the erection was made. But the tenant must give to the landlord a month's written notice of his intention to effect the removal, and thereupon the landlord, or his agent, is to have the option of purchase, the value to be settled by two referees, one for each party, or by an umpire named by the referees. This enactment is still in force. An extension, moreover, of the law in the same direction was effected by the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which contains (s. 34) the following provision:—

Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not, under this Act or otherwise, entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and

be removable by the tenant before or within a reasonable time after the termination of the tenancy.

Provided as follows:—

1. Before the removal of any fixture or *building*, the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding;

2. In the removal of any fixture or building, the tenant shall not do any avoidable damage to any other building or other part of the holding;

3. Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal;

4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it;

5. At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

It will be observed that under this statute it is no longer necessary for a tenant to have the landlord's consent to the erection of fixtures. It would seem that just as much as under the Act of 1875 (38 & 39 Vict. c. 92, s. 54) a landlord and tenant may contract themselves out of this Act (see s. 55) in respect to fixtures. Further legislation, however, in regard to the whole subject of agricultural holdings is expected before long, and possibly this defect, if it be a defect, will be remedied.

This Act only applies to holdings which are either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or to such as are either wholly or in part cultivated as market gardens (s. 54); and to tenancies which are either for a term of years, or for lives, or for lives and years, or from year to year (s. 61).

Time for Removal of Fixtures.—An important consideration in the removal by a tenant of fixtures—apart from contract or statute—is as to the latitude in time allowed him for the purpose by the law.

The nature of a tenant's interest—whether for a fixed term or of uncertain duration—does not affect his right of removal, except in so far as a tenant who has a term fixed should obviously have less indulgence than one who has an uncertain tenancy, and who therefore may be unprepared to remove his fixtures when it comes to an end (*Amos and Ferard*, 127).

A general rule has therefore been laid down both in early and in modern cases that a tenant for a fixed term must remove his fixture within that term, otherwise they become the property of the reversioner.

The law has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him yet, if he do not remove them during the lease, he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion; and if they are not removed, as the law would have enabled the person to remove them during the lease, they must be considered to have returned at once and finally to the owner of the reversion (per Lord Hatherley, *Meux v. Jacobs*, 1875, L. R. 7 H. L. 481).

To remove fixtures after the term has expired will ordinarily amount to a trespass (*Dudley v. Warde*, 1751, Amb. 113); for—

The tenant by the very act of annexing a chattel to the freehold, makes it part of the reversioner's property, and retains only a qualified right in it

namely, that of reducing it again to a chattel state within a certain time (Amos and Ferard, pp. 129, 130).

The time within which the tenant may remove fixtures is not extended by the mere retaining by him of possession after his term, even though he may as a fact not have abandoned them (*Leader v. Homwood*, 1858, 5 C. B. N. S. 546; *Barff v. Probyn*, 1894, 64 L. J. Q. B. 557); but it has been said to continue during "such further period of possession by him, as he holds the premises under a right still to consider himself as tenant" (*Weeton v. Woodcock*, 1840, 7 Mee. & W. 14, 19, and *Ex parte Brook*, 1878, 10 Ch. D. 100, 109), or as he holds over "in the capacity of a tenant" (*Roffey v. Henderson*, 1851, 17 Q. B. 574, 586), or during what has been called an "excessiveness" on, or an "enlargement" of, the term (*Mackintosh v. Trotter*, 1838, 3 Mee. & W. 184; *Ex parte Stephens*, 1877, 7 Ch. D. 127). There seems to be considerable doubt as to what circumstances will bring a tenant within the extension of the term referred to in the above authorities. It is thought probably to apply to tenants at sufferance; but not where a tenancy has been determined by re-entry (*Leader v. Homwood*, 1858, 5 C. B. N. S. 546; *Barff v. Probyn*, 1894, 64 L. J. Q. B. 557).

It seems clear, too, that the right of removal will not exist where the tenant retains possession wrongfully, and the circumstance that the term may have come to an end by forfeiture through his breach of covenant is immaterial (Amos and Ferard, 133, 137; *Minshall v. Lloyd*, 1837, 2 Mee. & W. 450; *Pugh v. Arton*, 1869, L. R. 8 Eq. 626). So after a surrender of his interest he cannot remove fixtures (per Thesiger, L.J., in *Ex parte Brook*, *supra*); but this does not apply to a purchaser or mortgagee of them under the tenant, who is allowed a reasonable time to sever them after the surrender, even though he may have expressly undertaken to remove them within a specified time after he has acquired them (*London and Westminster Loan Co. v. Drake*, 1859, 6 C. B. N. S. 798; *Saint v. Pilley*, 1875, L. R. 10 Ex. 137). Where, moreover, the tenant instead of quitting at the end of his term holds over, not wrongfully, but under an agreement for a fresh tenancy, the fixtures are considered as being demised to him along with the land, and his right of removal, in the absence of some express agreement, will accordingly be lost (see *Sharp v. Milligan*, 1857, 23 Beav. 419; *Thresher v. East London Waterworks Co.*, 1824, 2 Barn. & Cress. 608; 26 R. R. 486; notes to *Elwes v. Maw*, 2 Sm. L. C. at p. 213, 10th ed.). It is a not unusual precaution to provide specially in leases, either for the removal of fixtures by the tenant, or for the landlord to take them at a valuation, in which latter alternative the tenant has a right of action to recover their value after the expiration of the term (*Hallen v. Rinder*, 1834, 1 C. M. & R. 266). It is not uncommon, too, for a landlord to give a licence to the tenant to leave fixtures behind to be taken by his successor; but this, unless under seal, will not entitle the outgoing tenant to enter for the purpose of retaking possession of his fixtures after an incoming tenant has entered on the premises (*Roffey v. Henderson*, 1851, 17 Q. B. 574). The landlord, however, sometimes enters into a contract with the tenant to allow him to leave fixtures on the premises after the end of the term, with a view to their being taken by a successor or (if not so taken) removed by the tenant; and such contract will bind him even if not made in writing (*Thomas v. Jennings*, 1896, 66 L. J. Q. B. 5).

The general rule, that tenants must remove fixtures on or before the expiration of their terms, does not apply where their tenancies or interests are of an uncertain duration, e.g. tenancies for lives or at will (see *Oakley v. Monck*, 1866, L. R. 1 Ex. 159, 164; *Pugh v. Arton*, 1869, L. R. 8 Eq.

626, 630; *Ex parte Brook*, 1878, 10 Ch. D. 100, 109). Nor does it apply where the articles sought to be removed by the tenant are in law really chattels (see *ante*) and not fixtures (*Wansbrough v. Maton*, 1836, 4 Ad. & E. 884); nor where a right to remove fixtures at the end of the term is reserved by express agreement, for, even though no specified time be agreed upon within which to remove them after the expiration of the term, a reasonable time will be implied (*Stansfeld v. Mayor of Portsmouth*, 1858, 4 C. B. N. S. 120; *Sumner v. Bromilow*, 1865, 34 L. J. Q. B. 130).

Effect of Contract.—The effect of covenant, or contract, upon the law of fixtures, as between landlord and tenant, may be to vary it to any extent, either by curtailing or by enlarging a tenant's ordinary rights in the removal of fixtures, and this both as to what may be removed and as to the time of removal. Some illustrations of the working of such special contracts are subjoined. Thus in *Naylor v. Collinge* (1807, 1 Taun. 19; 9 R. R. 691), a covenant to yield up in repair "the demised messuage and premises, and all erections and buildings then already erected and built, and also all other erections or buildings that might thereafter be erected and built in or upon the said premises," was held to preclude the application of the ordinary rule as to the removal of trade fixtures, but not of articles in the nature of fixtures, but really chattels. In *Martyr v. Bradley* (1832, 9 Bing. 24) a tenant was held to have deprived himself by covenant of his right to remove fixtures which he had substituted for others during the term. *Dumergue v. Rumsey*, 1863, 2 H. & C. 777, affords an instance of a tenant depriving himself by contract of his ordinary right to remove tenant's fixtures during his term; and in *R. v. Topping*, 1825, M'Cle. & Yo. 544; 29 R. R. 839, the right to remove both original and added fixtures was held for the same reason to have been lost.

The covenants now spoken of are, of course, met with in great variety. Thus, in some cases (e.g. *Watson v. Lane*, 1856, 11 Ex. Rep. 769) the covenant is to deliver up all fixtures. In others it is only to deliver up a certain class of fixtures, leaving the tenant free to take the remainder. For illustrations of this kind of covenant, the reader is referred to *Foley v. Addenbrooke*, 1844, 13 Mee. & W. 174; *Stansfeld v. Mayor of Portsmouth*, 1858, 4 C. B. N. S. 120; *Porter v. Drew*, 1880, 5 C. P. D. 143; *Thomas v. Jennings*, 1896, 66 L. J. Q. B. 5. Again, in *Clark v. Crownshaw*, 1832, 3 Barn. & Adol. 804, the lessor had an option to take all fixtures at a valuation; and in *Storer v. Hunter*, 1824, 3 Barn. & Cress. 368, the contract was similar, but the lessor, instead of having an option, laid himself under an obligation to take them. In many cases the covenant specifies certain fixtures which are to be given up, and then uses "general words." If those specified are all of an irremovable character, the rule of *ejusdem generis* will apply (*Bishop v. Elliott*, 1855, 11 Ex. Rep. 113); whilst, if this is not the case, the disability will extend, by force of the general words, to fixtures of all kinds (*Bidder v. Trinidad Petroleum Co.*, 1868, 17 W. R. 153; *Wilson v. Whateley*, 1860 1 John. & H. 436).

The result of the decisions upon this branch of the subject may be said generally, to be that notwithstanding that the property in question may have belonged to the tenant, and whether it is permanently fixed to the freehold or not, it may still become irremovable, if, by the interpretation of the contract between himself and his landlord, it appears to have been contemplated by them that it should not be taken away at the expiration of the term; and that in interpreting such contracts, regard must be had to the subject-matter of the demise, a lease not being construed so as to tak

away the ordinary legal rights of a tenant, unless such an intention is clearly apparent (*Amos and Ferard*, 155, citing *Doe d. Freeland v. Burt*, 1787, 1 T. R. 701; 1 R. R. 367; *Bishop v. Elliott*, 1855, 11 Ex. Rep. 113; *Bidder v. Trinidad Petroleum Co.*, 1868, 17 W. R. 153; *Beaufort (Duke of) v. Bates*, 1862, 3 De G., F. & J. 381). On the other hand, powers of removal more extensive than those allowed by the ordinary law are sometimes given to the tenant by contract. Thus in *London and South African Exploration Co. v. De Beers Consolidated Mines*, [1895] App. Cas. 451, where the lease gave a tenant all such improvements as should be capable of removal without injury to the land itself, the tenant was held entitled to pull down and remove a brick building and materials, except the foundations which were below the surface of the soil.

The term "improvements," on which this case principally turned, is often found in the tenant's covenant to yield up in repair. As to the effect of its employment the reader should consult the following authorities: *Penry v. Brown*, 1818, 2 Stark. 403; 20 R. R. 705; *Sunderland v. Newton*, 1830, 3 Sim. 450; 30 R. R. 186; *Martyr v. Bradley*, 1832, 9 Bing. 24; *West v. Blakeway*, 1841, 2 Man. & G. 729; *Haslett v. Burt*, 1856, 18 C. B. 89.

Besides the restriction of a tenant's rights to remove fixtures arising from express contract, they may be rendered irremovable by his conduct or the special circumstances of the case. Thus in *Smith v. Kender*, 1857, 27 L. J. Ex. 83, a tenant was held debarred from removing a shed he had put up with the landlord's permission, and constructed with his materials, notwithstanding the fact that he had used some of his own materials also. In *Fitzherbert v. Shaw*, 1789, 1 Black. H. 258, and *Heap v. Barton*, 1852, 12 C. B. 274, in which that decision was followed, the tenants were held to be precluded from removing fixtures, which otherwise they would have been entitled to remove, on the principle that new arrangements had been entered into between the parties, the terms of which were inconsistent with such removal.

The subject of fixtures in its most important aspect, namely, as to their removability, has now, so far as its most salient features are concerned, been dealt with. It remains to notice shortly a few points connected with the disposition of fixtures, and of the land to which they are attached, upon sale, mortgage, devise, bankruptcy, and execution. A few words are added on the question of damages in relation to fixtures.

(a) *Sale*.—Upon the sale of land or a house, there can be no doubt that, at common law, in the absence of some expression in the contract showing or implying an intention to the contrary, all fixtures annexed or attached thereto will pass to the purchaser (*Colegrave v. Dias Santos*, 1823, 2 Barn. & Cress. 76; *Goff v. Harris*, 1843, 5 Man. & G. 473). The most common instance of a "contrary intention" is where particular fixtures, or fixtures of a particular class, are enumerated to the exclusion of others (*Hare v. Horton*, 1833, 5 Barn. & Adol. 715—a case of mortgage, but the principle is the same). And as regards dispositions of property made after the year 1881, it is now expressly enacted by the Conveyancing Act of that year (44 & 45 Vict. c. 41, s. 6) that a conveyance of land, whether with houses or other buildings thereon or not, is to be deemed to include and to operate to convey, with the realty, all fixtures appertaining or reputed to appertain thereto, or at the time of conveyance enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the same. But, as at common law, this is not to be the case if a contrary intention appears from the instrument (*ibid.*, subs. 4).

The rule is the same whether the premises which are the subject of sale are freehold or leasehold (*Meux v. Jacobs*, 1875, L. R. 7 H. L. 481, per Lord Selborne).

Where fixtures are sold apart from the land to which they are annexed, different considerations arise. The principal difficulty here is on the application of the Statute of Frauds, as modified by the Sale of Goods Act, 1893. It has been twice expressly decided that the sale of unsevered fixtures is not a sale of an interest in land within sec. 4 of the earlier statute (*Hallen v. Runder*, 1834, 1 C. M. & R. 266; *Lee v. Gaskell*, 1876, 1 Q. B. D. 700). If the sale be by a tenant to his landlord, it only amounts to a contract to abandon his rights of removal; if to a third person, the contract is merely to transfer those rights to him (see per Cockburn, C.J., *Lee v. Gaskell*, *supra*). The authority just referred to also decides that the transaction is not a sale of "goods, wares, or merchandises" within the 17th section. This section, however, is now repealed by the Sale of Goods Act (56 & 57 Vict. c. 71, s. 60), being replaced by sec. 4 of that Act; and the question now seems to turn entirely on the meaning of the words in the definition (in sec. 62) of "goods," which include all "things attached to, or forming part of, the land, *which are agreed to be severed before sale or under the contract of sale.*" The definition is by no means clear, but it is conceived that there must be an actual agreement between the parties to sever the fixtures in order that they may fall within it; and that the mere fact, for instance, that they are sold by a tenant to a stranger, to whom the fixtures in their unsevered state would be of no use, and who must therefore have contemplated severance by the contract, would not be sufficient. A sale of fixtures, again, to an incoming tenant, or to the landlord himself, would seem, in conformity with the old decisions, to be clearly not a sale of "goods" within the Act. It may be added that a contract to provide land with machinery or other fixtures to be attached to it is not a contract for the sale of goods, as the intention is not to make a sale of movable chattels, but to make improvements on the land, and the consideration to be paid is not for a transfer of chattels, but for work and labour done and materials furnished in adding something to the land (*Clark v. Bulmer*, 1843, 11 Mee. & W. 243; Benjamin on *Sale*, p. 108, 4th ed.).

(b) *Mortgage*.—As in the case of sale, upon a mortgage of real property, in the absence of an intention, express or implied (see *Hare v. Horton*, *supra*), to the contrary, the fixtures annexed thereto will pass to the mortgagee, and form part of his security. This rule, as in the case of sale, and in a manner precisely similar (see *supra*), has been applied to mortgages made after the year 1881 by the Conveyancing Act, s. 6. It applies equally in mortgages of freeholds or leaseholds, and in those which are equitable equally with those which are legal, as where leases or title-deeds are deposited, with or without an accompanying memorandum (*Ex parte Barclay*, 1855, 5 De G., M. & G. 403; *Williams v. Evans*, 1856, 23 Beav. 239; *Meux v. Jacobs*, 1875, L. R. 7 H. L. 481). But when leasehold property is mortgaged by sub-demise, the absolute property in the fixtures as separate chattels, with the right to remove and sell them, will not pass to the mortgagee, unless an intention to that effect appear in the mortgage (*Southport and West Lancashire Banking Co. v. Thompson*, 1887, 37 Ch. D. 64). The rule, moreover, applies just as much to fixtures attached to the land after the mortgage as to those in existence at the time, and just as much to those attached for their more convenient user as to those put up for the improvement of the inheritance (*Cullwick v. Swindell*, 1866, L. R. 3 Eq. 249; *Climie v. Wood*, 1869, L. R. 4 Ex. 328). It follows that, where

premises have been mortgaged, neither the mortgagor, nor any person claiming under him who may continue in possession, is entitled to remove fixtures as against the mortgagee (*Hitchman v. Walton*, 1838, 4 Mee. & W. 409). But if the mortgagor is permitted by the mortgagee to deal with the property after the mortgage, e.g. by letting to a tenant, the mortgagee will be presumed to have acquiesced, and consequently, if the tenant erect fixtures removable as between himself and his landlord, his claim to sever them will prevail as against the mortgagee (*Sanders v. Daris*, 1885, 15 Q. B. D. 218). Similarly, if the mortgagor, being left in possession, erects fixtures necessary for the ordinary conduct of his business, and hires others on the terms that the owner shall be free to remove them when the period of hiring has expired, the mortgagee will be presumed to have assented, and consequently will not be allowed to claim them if they are removed before he takes possession (*Gough v. Wood*, [1894] 1 Q. B. 713; *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415). But this principle will not apply where the removal has taken place, not in the ordinary course of business by the mortgagor, and not with the implied authority of the mortgagee, but expressly for the purpose of defeating his claim (*Huddersfield Banking Co. v. Henry Lister & Son*, [1895] 2 Ch. 273).

The mortgage of fixtures apart from land falls within the purview of the Bills of Sale Acts, and can only be touched on under this head. By the Act of 1878 (41 & 42 Vict. c. 31), it is provided (s. 4) that personal chattels include fixtures when separately assigned or charged, but not fixtures (except trade machinery as hereinafter defined) (see s. 5) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed. And (s. 7) no fixtures are to be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed without otherwise taking possession of, or dealing with, such land or building, if by the same instrument any freehold or leasehold interest in the land or building is also conveyed or assigned to the same person. Moreover, where fixtures separately assigned or charged are attached to any land or house in substitution for any of the like fixtures specifically described in the schedule to a bill of sale, the provisions of the Act of 1882 (45 & 46 Vict. c. 43) are not to apply (s. 6) so far as they render all bills of sale given by way of security for the payment of money (s. 3) void (except as against the grantor) in respect of any personal chattels not specifically described (s. 4), and in respect of any personal chattels specifically described, of which the grantor was not the true owner at the time of the execution of the bill of sale (s. 5). It must, however, be remembered that by the Act of 1878, s. 5, trade machinery, for the purposes of the Act, is deemed to be personal chattels, and therefore not to be classed for those purposes with fixtures of other kinds; trade machinery being defined as "the machinery used in, or attached to, any factory or workshop [see the definition of these words in the section], exclusive of the fixed motive-powers, . . . the fixed-power machinery, . . . and the pipes for steam, gas, and water" (see MACHINERY).

(c) *Devise*.—When land with fixtures annexed thereto is devised by will, the general rule is that all the fixtures pass to the devisee, who, as between himself and the executor of the person who has affixed them, stands in exactly the same position as the heir (*Norton v. Dashwood*, [1896] 2 Ch. 497; see *ante*). The purpose or intention of the annexation, which has been already referred to as important in deciding the question of removability, has been said to have peculiar force when the case arises between executor

and devisee, inasmuch as the intention of making the annexation permanent is more easily inferred where the freehold is the property of the person making it than where it is the property of another person (*ibid.*, per Chitty, J.).

With regard to the devise of fixtures apart from land, it may be mentioned that questions often arise in the construction of wills as to whether fixtures belonging to the testator have or have not passed by a particular bequest. The general rule may be said to be that by the use of words which are more apt to describe chattels, e.g. "furniture" (*Allen v. Allen*, 1728, Mos. 112), "household goods" (1 Roper on *Legacies*, 256, 257), "household furniture" (*Finney v. Grice*, 1878, 10 Ch. D. 13), the fixtures will not pass. But the contrary may, of course, result by reason of special circumstances (*ibid.*, per Jessel, M. R.), the question being one of intention; and where these exist fixtures may pass by the use of the term "household furniture" (*Paton v. Sheppard*, 1839, 10 Sim. 186) or "effects" (*Pinder v. Pinder*, 1870, 18 W. R. 309). Fixtures of a certain kind have also been held to pass by use of the expression "fixed furniture" (*Birch v. Dawson*, 1834, 2 Ad. & E. 37).

(d) *Bankruptcy*.—Upon the bankruptcy of a person in the possession of lands or tenements with fixtures annexed thereto, the fixtures removable by him are "property divisible amongst his creditors" within sec. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). This is by reason either of their being property belonging to the bankrupt, or of the right of severance being a capacity to exercise a power in respect of property which might have been exercised by the bankrupt. But fixtures are not "goods" (which term, by s. 168, "includes all chattels personal") within the reputed ownership clause of the 44th section; for the possession of fixtures by a bankrupt is not a possession of them as goods and chattels, but as part of the land or buildings to which they are annexed (*Ex parte Barclay*, 1855, 5 De G., M. & G. 403). Consequently, where the owner of an interest in land, whether for years or in fee, mortgages the land with (or without; see *ante*) the fixtures, his trustee, upon bankruptcy supervening, cannot claim the latter as against the mortgagee on the ground of their being in the possession, order, or disposition of the bankrupt (*ibid.*). This, however, does not apply to articles in the nature of fixtures which (see *ante*) are really chattels (*Horn v. Baker*, 1808, 9 East, 215; 9 R. R. 541; 2 Sm. L. C. 223, 10th ed.). But the principle that fixtures are not goods within the reputed ownership clause applies none the less where they are dealt with separately from the land to which they belong (*Whitmore v. Empson*, 1856, 26 L. J. Ch. 364), though in that case, as already seen, the transaction falls within the Bills of Sale Acts, and requires registration for its validity. By the Act of 1878, s. 20—the repeal of this section by sec. 15 of the Act of 1882 has been held not to affect bills of sale given by way of absolute transfer (*Swift v. Pannell*, 1883, 24 Ch. D. 210)—chattels comprised in a duly registered bill of sale are not to be deemed within the reputed ownership clause; so that, although for the purposes of the Act fixtures are chattels if separately assigned (s. 4), it would seem that they are still outside the reputed ownership clause, whether comprised in a registered document or not (see notes to *Horn v. Baker*, 2 Sm. L. C. at p. 246).

Where the trustee of the bankrupt wishes to exercise the power now given to him to disclaim onerous leasehold property, special provision is made empowering the Court, upon his application for the necessary leave to disclaim, to make such orders with respect to fixtures as it thinks just (46 & 47 Vict. c. 52, s. 55, subs. 3). But under this provision the same rule

as to removing fixtures will in general prevail as between the trustee and the landlord as would have prevailed in favour of the tenant in the ordinary course; so that the landlord must either take over the fixtures at a valuation, or give the trustee a reasonable opportunity of removing them (*In re Moser*, 1884, 13 Q. B. D. 738).

(e) *Execution*.—Although the writ of *fi. fa.* (see EXECUTION) is only available in general against personal chattels (see Form of Writ in App. H to R. S. C. 1883), fixtures may be said to form an exception to the rule, as although while unsevered they are part of the realty, the power of converting them into personalty which the debtor, as has been seen, often possesses, forms a kind of property capable of being reached by that writ. That a tenant's trade fixtures, for instance, can be so taken in execution admits of no doubt (*Poole's case*, 1703, 1 Salk. 368); and the same principle would apply where the fixtures having been put up for purposes of agriculture or of ornament are within the rule as to removability which has already been discussed. But the power of the sheriff to take fixtures under this writ is strictly limited to cases where the debtor could have removed them himself; so that where, for instance, the debtor is precluded from doing so by the terms of his lease (*Dumergue v. Rumsey*, 1863, 2 H. & C. 777; *Richardson v. Ardley*, 1869, 38 L. J. Ch. 508), or where the fixtures having been demised to him with the land, he has severed them unlawfully (*Farrant v. Thompson*, 1822, 5 Barn. & Ald. 826; 24 R. R. 571), they cannot be taken by this writ. Nor is the writ available in the case of fixtures on premises which are the freehold property of the debtor (*Winn v. Ingilby*, 1822, 5 Barn. & Ald. 625; 24 R. R. 503; *Place v. Fagg*, 1829, 4 Man. & Ry. 277).

As to exemption of fixtures from distress, see DISTRESS. It may be added that they are not "goods" (*Co. Litt.* 145 b) which can be made the subject of replevin (see *Gibbs v. Cruikshank*, 1873, L. R. 8 C. P. 454).

(f) *Damages*.—Actions in relation to fixtures may be brought either in contract or in tort. In tort, the two forms are trover and trespass, the damages recoverable in the two cases being different; and though forms of action are no longer of importance, it is thought that the question of damages must still depend on the form in which an action in any particular case before the Judicature Acts must have been brought. In the former action for fixtures which have been wrongfully removed, the plaintiff can only recover their value as chattels (*Clarke v. Holford*, 1848, 2 Car. & Kir. 540; Mayne on *Damages*, p. 387, 5th ed.); whereas in the latter he can recover their actual value as fixtures in an unsevered state (*Thompson v. Pettitt*, 1847, 10 Q. B. 101; Mayne, p. 407). In both actions, however, it is necessary to show that the fixtures have been disannexed before they are brought (*Wilde v. Waters*, 1855, 16 C. B. 637; *Amos and Ferard*, 367), though this is not the case so far as concerns articles in the nature of fixtures, but really chattels by virtue of the annexation to the freehold being incomplete (*Davis v. Jones*, 1818, 2 Barn. & Ald. 165; 20 R. R. 396; *Wansbrough v. Maton*, 1836, 4 Ad. & E. 884). Where, however, the fixtures are unsevered and the ground of complaint is interference by which their removal is prevented, an action on the case may be brought, and, as in conversion, the damages recoverable are the value of the fixtures as severed (*London and Westminster Loan and Discount Co. v. Drake*, 1859, 6 C. B. N. S. 798). The rule has been stated in a more expanded form by Hawkins, J., as follows:—that the amount of damages should be arrived at by ascertaining first of all what would be the value of the materials of the fixtures on the premises, when and as severed from the freehold for the

purpose of re-erecting them elsewhere—having regard to their age and condition—minus the cost of severing them (if severed by the defendants), and minus also the amount of the reasonable cost of making good, as far as possible, the damages and costs occasioned to the premises in severing the fixtures, storing the materials, carrying them away, and any permanent damage (if any) occasioned to the premises which cannot be made good (*Thomas v. Jennings*, 1896, 66 L. J. Q. B. 5).

When the action for fixtures is brought in contract, as in the case of the breach of covenant to yield up the premises with the fixtures in repair between landlord and tenant (see *ante*), the measure of damages is to be ascertained by the ordinary rules (Mayne, pp. 10 *et seq.*). On failure to observe a covenant to deliver up fixtures at the end of the term, the measure of damages has been decided to be the actual loss sustained by the landlord, and not necessarily the full value of the fixtures (*Watson v. Lane*, 1856, 11 Ex. Rep. 769).

It may be added that when the remedy in damages is thought inadequate, the wrongful removal of fixtures will, as an act of waste, be restrained, in a proper case, by injunction (*Sunderland v. Newton*, 1830, 3 Sim. 450; 30 R. R. 186; *Richardson v. Ardley*, 1869, 38 L. J. Ch. 508); but this does not apply in the case of things in the nature of fixtures, but really chattels (*Kimpton v. Eve*, 1813, 2 Ves. & Bea. 349; 13 R. R. 116).

[*Authorities.*—Amos and Ferard, *Law of Fixtures*, 3rd ed., 1883, by Ferard and Roberts; Notes to Smith's *Leading Cases*, vol. ii. pp. 183–222, 10th ed., *Elves v. Maw*; Brown, *Law of Fixtures*, 3rd ed., 1875.]

Flag, Law of.—See AFFREIGHTMENT; INTERNATIONAL LAW.

Flag, National.—On the union of England and Scotland, proclamation was issued in 1707, under the Act of Union, 6 Anne, c. 11, art. 1, conjoining the crosses of St. George and St. Andrew on the flag of the united nations. On the union with Ireland, proclamations were issued under 39 & 40 Geo. III. c. 67, art. 1, establishing the union jack as the union flag, and declaring the ensigns and colours to be used on British merchant ships (St. R. & O., Rev., vol. i. p. 22).

By Order in Council of 9th July 1864 (not made under statutory authority), the white ensign with the union jack was appointed for the Royal Navy; the blue ensign for ships commanded by officers of the Naval Reserve, and having ten naval reservemen on board (Queen's Regulations, art. 40); and the red ensign for all other British ships and vessels. By the Merchant Shipping Colours Act, 1889 (52 & 53 Vict. c. 73, s. 1), the red ensign without any defacement or modification was declared the proper national colours for all British vessels, except Queen's ships and ships or boats allowed under warrant from the Queen or Admiralty to use other colours, *e.g.* Royal Yacht Clubs.

This provision was repealed in 1894 and re-enacted as sec. 73 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). Merchant ships may also use the union jack with a white border as signal for a pilot. Use of any other colours subjects the master or the owner, if on board, to a fine not exceeding £500 (s. 73 (2)).

British vessels, other than duly lettered, numbered, and registered fishing boats, must also, under penalty, show their colours on signal from a Queen's

ship and on entering or leaving a foreign port, and if over 50 tons burden on entering or leaving a British port (57 & 58 Vict. c. 60, s. 74). All the proclamations in force as to flags are printed in St. R. & O., Rev., vol. i. pp. 22-32, and the whole history of the subject is given in a Stationery Office paper—*The Flags of all Nations*.

Flat.—In the ordinary use of the term a flat is a self-contained set of rooms, structurally divided and separately owned or let from the rest of a building, which for the most part consists of other flats separated in like manner. Formerly a flat would commonly comprise an entire storey or floor, but the increased size of modern buildings has rendered this less usual. The word is one of popular use without any defined legal significance.

Sometimes flats are separately owned, in which case they are practically separate houses built one above the other. But in most cases the entire building is the property of one landlord, who lets the various flats separately, reserving accommodation for a resident porter or caretaker appointed by himself.

The legal position of the parties therefore largely depends upon the effect of the agreements of letting—which are if executory within the Statute of Frauds (s. 4)—according to the ordinary law of landlord and tenant. But in some matters, and especially where the question is one of implying grants or covenants, the Courts take cognisance of the peculiar circumstances of buildings so divided. And if the extent of the premises passing under the grant of a flat were in dispute, a like regard would no doubt be had to its special conditions. For, as was said in an old case by way of illustration, it would be the greatest injustice to put the general construction of law on grants of the houses in the Adelphi, and to hold that they passed the warehouses and cellars underneath, it being notorious that these are held under distinct titles from the houses themselves (*Doc v. Burt*, 1787, 1 T. R. 701; 1 R. R. 367). Other features requiring consideration are the rights of an occupier of a flat over portions of the building not included in his demise, and his position as occupier, owner, or lodger, under the special categories adopted by certain statutes.

Mutual Rights of Owners and Occupiers.—The owner of an upper storey, without any express grant, or enjoyment for any given time, has a right to the support of the lower storey (*Humphries v. Brogden*, 1850, 12 Q. B. 739, per Lord Campbell, C.J., at p. 747). But this right, being an easement, does not impose upon the owner of the lower storey the duty of actively maintaining such support, the rule being that he who uses an easement must repair. It does entitle the dominant owner to enter upon the servient tenement to do necessary repairs. And a tenant's right to support from other property belonging to his lessor would seem to be subject to the same limitation as a rule, and in the absence of an express covenant to repair (*Colebeck v. Girdlers' Co.*, 1876, 1 Q. B. D. 234). A covenant by the grantor or lessor to repair the subject-matter of an easement may, however, be implied from special circumstances, and it is possible that the difficulties which a tenant of a flat in a large building would meet with in repairing the structural support of his flat may be held to justify such an implication. The grounds of the decision in the case of *Miller v. Hancock*, [1893] 2 Q. B. 177, seem to apply in many respects to a tenant's right to support.

In that case the plaintiff, while visiting a house divided into flats on

a matter of business with one of the tenants, fell and was injured owing to the defective condition of the main staircase, of which no mention was made in the agreements of letting. He was held entitled to recover against the landlord on the ground that, inasmuch as the staircase was essential to the enjoyment of the flats, and under the control of the landlord, there was an implied undertaking by him to keep it reasonably safe for the use, both of the tenants and of those who would necessarily use it in the course of business with them. A mere licence, however, to the tenants to use a part of the building not essential to the enjoyment of their flats would not involve such a liability (*Ivay v. Hedges*, 1882, 9 Q. B. D. 80).

Where by his lease a tenant of upper rooms was entitled to use a staircase in common with other tenants, and the landlord without his knowledge removed it in part, substituting a less convenient staircase, a mandatory injunction compelling its reinstatement was granted to the lessee on motion before trial (*Allport v. Securities Corporation*, 1895, 64 L. J. Ch. 491).

On the other hand, if a tenancy is entered into upon the footing that machinery or apparatus is to be employed for the common use of the various flats, a tenant must take the burden of accidental injury with the benefit. In *Anderson v. Oppenheimer*, 1880, 5 Q. B. D. 602, the various floors were supplied with water from a cistern at the top of the building. The bursting of a pipe on the first floor injured goods stored in the basement. It was held that in the absence of negligence on the part of the landlord, the lessee of the basement could not recover against him. If there had been a breach of his covenant for quiet enjoyment, it resulted from acts done before the demise, while the storage of water in the cistern, being for the benefit of the plaintiff among others, was not at the peril of the landlord (see *Carstairs v. Taylor*, 1871, L. R. 6 Ex. 217). But where similar injury is suffered through an overflow of water caused by the negligence of another tenant, an action lies against the wrong-doer. And for the negligence of a servant acting within the scope of his employment, or incidentally thereto, the master is liable (*Ruddiman v. Smith*, 1889, 60 L. T. 708; *Stevens v. Woodward*, 1881, 6 Q. B. D. 318).

Where the agreements of letting are in a common form, an obligation on the part of the landlord may in some cases be implied not to depart from the scheme of the building thereby indicated. Thus where they were only applicable to residential flats, he was restrained at the suit of a tenant from converting during the tenancy a large part of the building into a club (*Hudson v. Cripps*, [1896] 1 Ch. 265).

A contract by the landlord for the appointment and attendance of a porter will not be specifically enforced, the tenants' only remedy being in damages (*Ryan v. Mutual Tontine Association*, [1893] 1 Ch. 116). And the granting of an injunction to restrain a nuisance created by another tenant's unreasonable use of his flat, is a matter of discretion (*Jenkins v. Jackson*, 1888, 40 Ch. D. 71).

If a flat should be entirely destroyed by fire, a tenant who has entered into an express and unqualified covenant or agreement to pay rent will be held to his contract, and remain liable until the expiration of his tenancy. In the absence of such contract, it was argued in a leading case that tenants from year to year of a second floor were not liable for use and occupation after it was burnt out, inasmuch as the liability of the tenant of an entire house arose from his continued enjoyment of the land, which these tenants had not. But the claim was held good, and the tenants were said to have a subsisting interest which would entitle them, in case of rebuilding, to re-enter (*Izon v. Gorton*, 1839, 5 Bing. N. C. 501; cp. *Packer v.*

Gibbins, 1841, 1 Q. B. 421). A tenant should therefore be careful to provide against such a contingency in the agreement of letting.

Rates and Taxes.—A tenant of a flat has generally the exclusive occupation by the terms of his tenancy, and is rateable to the poor-rate (*R. v. St. George's Union*, 1871, L. R. 7 Q. B. 90). The house tax, on the other hand, is payable by the owner or landlord where he resides within the limits of the collector. Otherwise, or in case of default in payment for twenty days, it may be levied on the actual occupiers, and deducted by them from their next payment of rent (48 Geo. III. c. 55, Sched. B, rules 6 and 14). Such tax is levied only on dwelling-houses, and in assessing their value, flats, unoccupied or occupied solely for business or professional purposes, are to be exempted (Customs Act, 1878, 41 Vict. c. 15, s. 13). Whether a landlord who retains (otherwise than as a caretaker) and occupies a portion of the building himself can claim the benefit of this enactment, which deals only with buildings "divided into, and let in, different tenements," is doubtful, judicial opinions being at variance (see *Hoddinot v. Home and Colonial Stores*, [1896] 1 Q. B. 169).

Agreements in leases as to the payment of rates and taxes by the respective parties have been discussed under the title **BEAR AND PAY**.

Lodgers' Goods Protection Act, 1871.—How far a tenant of a residential flat may be considered a "lodger" within the meaning of this Act is a question hitherto not decided. The test of such claims is the amount of control exercised by the landlord over the demised premises. In the case of a flat this would in most cases depend entirely upon the agreements of letting. Where these provide for the entry by the landlord in certain specified events, it would seem difficult to contend that the tenant is a lodger even within the liberal interpretation appropriate to a remedial Act (see *R. v. St. George's Union*, *supra*, and **DISTRESS; LODGER**).

[*Authority.*—See Clode, *Tenement Houses and Flats*.]

Fleet Prison, Marriages and Registers.—The prison is said to have dated from Norman times. For some particulars as to the history of the building and of the site, see *London: Past and Present*, by Wheatley and Cunningham, *s.v.* It seems never to have been a penal establishment of the ordinary kind, but to have received special prisoners, such as debtors, those committed for contempt of court, etc. Little is known of the gaol in early times; with its latest form Dickens has made us familiar in *Pickwick* and *Little Dorrit*. The scandals, which form the bulk of the details concerning this place that have come down to us, are only a sample of the general state of our prison system, which has only been sensibly reformed within the last hundred years. After many legislative vicissitudes the prison was abolished by 5 & 6 Vict. c. 22.

The origin of *Fleet Marriages* seems to have been as follows:—At common law neither priest nor banns nor a licence were necessary to the validity of a marriage, and in the course of time, especially in London, clandestine marriages became frequent in certain notorious churches and chapels "exempted from the visitation of the Ordinary, the ministers of which churches did usually marry without licence or banns" (Burn, *History of Fleet Marriages*, 2nd ed., 1834,—a learned work of research, which may be consulted generally on this subject). In 1686 the Commissioners for Ecclesiastical Causes suspended the Rector of St. James's, Duke's Place, for practices of this sort,—a proceeding which seems to have been widely

known. "It may fairly be conjectured," says Mr. Burn, "that when the practice of clandestine marriages at Duke's Place and Trinity Minories was checked by" the Order of the Commissioners (1 Compton, 94) "and the suspension of Mr. Elliott, it was taken up by certain real and pretended clergymen in and about the prisons—not, however, on account of any *real* privilege and exemption attaching to these prisons, for the marriages were not even confined to the Rules of the Fleet," *i.e.* the immediate neighbourhood which some prisoners were allowed to frequent, "but were performed sometimes at the villages adjacent, but because these Fleet parsons were generally prisoners enjoying the Rules of the Fleet, and had neither liberty, money, nor credit to lose by any proceedings the bishop might institute against them." According to the same authority, the earliest recorded Fleet marriage took place in 1613; the earliest recorded in a Fleet register took place in 1674, and there is nothing clandestine about that or those registered in that particular volume. It was only about the date of the Commissioners' Order that Fleet marriages began to be clandestine, for the dates given in the Fleet registers, with the exception of that just mentioned, all commence about the date of the Order—after which, of course, marriages without banns or licence could not safely be celebrated in ordinary places of worship. Statutes dealing with the mischief are 6 & 7 Will. III. c. 7 and 7 & 8 Will. III. c. 35, 10 Anne, c. 19, s. 176. The early, *i.e.* the regular, Fleet weddings were performed in the prison chapel, "but as the practice extended it was found more convenient to have other places within the Rules . . . and thereupon many of the Fleet parsons and tavern-keepers in the neighbourhood fitted up a room in their respective lodgings or houses as a chapel," and hence the numberless iniquities (for which, see Burn, *passim*). The marriages, though "irregular," continued valid and indissoluble till the whole system was swept away by Lord Hardwicke's Act in 1753, 26 Geo. II. c. 33. It took effect from March 25, 1754, and the last Fleet marriage took place on the day before, when a great many couples were united. ["We still have a species of Fleet parson left," says Mr. Burn in 1834, "in the person of the Rev. David Lang of GRETNA GREEN, where clandestine marriages may still be solemnised, but not at so small a charge as the cheap weddings of the Fleet."]

The *Fleet Registers* consist of "about two or three hundred large registers" and a thousand or more rough or "pocket" books. By 1821 they had come into private hands, from which they were purchased by the Government, who consigned them to the Registry of the Consistory Court of London, whence they passed to the Registrar-General by virtue of 3 & 4 Vict. c. 92. The dates of these range from 1686 to 1754. Others may possibly be still in private hands.

The practical importance of their records obviously diminishes as time goes on, but there is always a possibility of any entry being tendered as evidence. The practice of the Courts has varied with regard to their reception. At first they seem to have let them in. Lord Hardwicke was, perhaps, the first to reject them absolutely. Lord Kenyon at first expressed doubt, but "was inclined to think that in a Pedigree case they were admissible" (*Lawrence v. Dixon*, 1792, 1 Pea. 185), but finally rejected them altogether (*Reed v. Passer*, 1794, *ibid.* 303; 1 Esp. 212—there is an important contradiction between the two reports, 3 R. R. 696). "I give no opinion that the Fleet Register is evidence, as a register. But I am not prepared to say it may not be received as evidence of a fact, and I can suppose a case in which such evidence might be received" (per

Eldon, C., in *Lloyd v. Passingham*, 1809, 16 Ves. 59, 14 R. R. 228). He suggested that it might be admitted as "a declaration under the hand of the party." It may be taken that these documents would not be admitted now (see Taylor on *Evidence*, s. 1592 n).

Flints.—In *Tucker v. Linger*, 1883, 8 App. Cas. 508, it was held that it was a reasonable agricultural custom for the tenant of a farm to sell for his own benefit flints turned up in the ordinary course of good husbandry, even though flints might be included in the "mines and minerals" reserved by the lease to the landlord. As to obtaining flints for the repair of highways, see HIGHWAYS.

Floating Security.—"A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default" (per Lord Macnaghten in *Government Stock, etc., Co. v. Manila Ry. Co.*, [1897] App. Cas. 81, 86; and see *Florence Land and Public Works Co.*, 1878, 10 Ch. D. 530, 541; *Colonial Trusts Corporation*, 1879, 15 Ch. D. 465; *Robson v. Smith*, [1895] 1 Ch. 118; 1 Palmer, *Co. Prec.*, 6th ed., 614, and article DEBENTURE, vol. iv. p. 142).

The terms "floating security" and "floating charge" are synonymous (1 Palmer, 631, 670). Both of them have for many years been in common use in financial and mercantile circles, and have been adopted by lawyers and received judicial recognition. The term "floating charge" has recently been acknowledged by the Legislature as having a defined legal meaning (see Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), referred to at the end of this article). It has been suggested that the terms had a trans-Atlantic origin; but they are generally used in connection with debentures, which are more or less of a novelty in America (see AMERICAN SECURITIES). A floating security has, however, been given by an individual trader (see *Tailby v. Official Receiver*, 1888, 13 App. Cas. 523, 541).

The earlier editions of the standard English books on conveyancing were mostly written before the passing of the Companies Act, 1862, and therefore it is not surprising that they omitted forms of debentures. But the third edition of the second volume of Davidson's *Conveyancing* (published in 1869) contained a precedent of a mortgage debenture of a limited company. In this form the company is made to charge its undertaking and present and future property, but so that the charge created "may be a floating security, not hindering any sale, exchange, or lease of the said lands or any part thereof, or the receipt or payment of any moneys, or any other dealings in the course of the business of the said company, but attaching to the premises leased, and the proceeds of any sale or exchange, and the lands or other property purchased therewith, or with any moneys of the company." At page 1225 of the same book there is a note "as to the insertion of a clause making the debenture a floating security," which says that "although the objects of the company comprise the buying and selling

of land, it is not necessarily *ultra vires*, or a breach of trust on the part of the directors to issue debentures, charging all the property of the company, although their effect may be to *hamper the operations of the company*, by rendering the concurrence of the debenture-holders necessary in all dealings with the land (*In re Marine Mansions Co.*, 1868, L. R. 4 Eq. 601). Where, however, the operations of the company comprise dealings in land, it may be desirable, in order to obviate the inconvenience just referred to, that the debentures should (as in the precedent in the text) contain a clause making them operate as floating securities only. "But some care is requisite in framing a debenture in this form, in order to avoid letting in the claims of subsequent mortgagees or general creditors"; and the authors refer to *Wickham v. New Brunswick, etc., Ry. Co.*, 1865, L. R. 1 P. C. 64. The debentures in the last case did not expressly state that they were a floating security or charge, but they contained words to prevent any restriction on the company's power to sell or appropriate its lands. Later cases establish that the actual use of the words "floating security" or "floating charge" is unnecessary, and tend to show that where all the property of the company is charged the security will if possible be held to be a floating one (see *Florence Land Co.*, 1878, 10 Ch. D. 530; *Colonial Trusts Corporation*, 1879, 15 Ch. D. 707). In neither of these cases did the debentures refer in terms to their being only floating securities or charges. The debentures in fact were bare charges on all the companies' assets, and the two cases are strong authorities to show how expedient it is to expressly state that a debenture is *not* to be a floating security when that is the intention of the parties and all the company's property is charged. Even before these cases had been decided, the first edition of Palmer's *Company Precedents* (published in 1877) had given to the profession a form of mortgage debenture which was *not* described in terms as a floating security or charge, but which gave the company the power of dealing with the assets charged, which is an essential of what is now known as a floating security—that is to say the form contains a provision that notwithstanding the charge created the company shall, until one of certain events happens, "be at liberty, in the course of its business and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the said property." But Mr. Palmer takes care "to avoid letting in the claims of subsequent mortgagees" by adding a clause, which has since come into very general use, that "nothing herein contained shall be taken to authorise the creation of any mortgage or charge of or upon the said property, or any part thereof, having priority over the said charge." As to the effect of omitting such a clause, see *Wheatley v. Silkstone, etc., Co.*, 1885, 29 Ch. D. 715; and as to its operation, when inserted, see *English and Scottish, etc., Trust v. Brunton*, [1892] 2 Q. B. 1; *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434, and other cases cited in 2 Palmer, 403).

Fashions, however, change, even in company drafting. In 1878, when sitting in the Court of Appeal on the hearing of *Florence Land Co.* (*ubi supra*), Jessel, M. R., practically described a floating charge—though he did not so call what he defined—as "a charge on the property of the company" which is "subject to the powers of the directors to carry on the business, and to let, sell, or mortgage as they think fit in the ordinary course of business, until the creditor in some way or other interferes" (10 Ch. D. 541). And in 1879, in *Colonial Trusts Corporation* (*ubi supra*), the same judge gives judicial recognition to the term "floating security," while counsel arguing before him speak of the debentures as a "floating charge."

After this recognition of the terms, one is not surprised to find that Mr. Palmer, in his second edition of *Company Precedents* (published in 1881), makes his form of mortgage debenture state that the charge thereby created "shall be a floating security." He does not, however, entirely rely on this term, for he proceeds to provide expressly that the company may in the course of business deal with the property charged, and he retains the clause prohibiting mortgages or charges which are to take priority. The same learned author now considers that "the meaning of a floating charge or security is well settled," and his more recent forms simply state that the charge given "is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge [on its freehold and leasehold land] in priority to the said debentures" (1 Palmer, 6th ed., 670, published in 1895). The principal reported decisions which justify the statement that the meaning of the term is settled are referred to under the title DEBENTURE.

The Act of 1897, mentioned above, contains the following provisions:—(s. 2) "In the winding up of any company under the Companies Act, 1862, and the Acts amending the same, the debts mentioned in sec. 1 of the Preferential Payments in Bankruptcy Act, 1888, shall, so far as the assets of the company available for payment of general creditors may be insufficient to meet them, have priority over the claims of holders of debentures or debenture stock under any floating charge created by such company, and shall be paid accordingly out of any property comprised in or subject to such charge." (s. 3) "In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge, or in case possession is taken by or on behalf of such debenture-holders of any property comprised in or subject to such charge, then and in either of such cases, if the company is not at the time in course of being wound up, the debts mentioned in sec. 1 of the said Preferential Payments Act shall be paid forthwith out of any assets coming to the hands of the receiver, or other person taking possession as aforesaid, in priority to any claim for principal or interest in respect of such debentures or debenture stock. And the periods of time mentioned in the said Act shall be reckoned from the date of the appointment of the receiver or possession being taken as aforesaid, as the case may be. But any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors."

[*Authorities.*—All the principal authorities are mentioned in the text, and in the bibliography to the article DEBENTURE, vol. iv. p. 153.]

Flogging.—See WHIPPING.

Floods; Floodgates.—1. There are no public general statutes dealing with the prevention of floods except the Statutes of Sewers, which provide for the creation of commissioners for the protection and drainage of lands liable to flooding from sea-water or land-water (see SEWERS). In London provision is made by a local Act of 1879 (42 & 43 Vict. c. excviii).

2. The nature and extent of the civil liability for damage caused by floods has been the subject of much litigation. The liability varies, according as the water which causes damage (1) does or does not flow in a defined channel, above or below the surface; (2) was or was not artificially brought on to the land from which it escapes and causes damage.

In the case of natural watercourses, the superior proprietor is under no liability at common law to the inferior proprietor to take any precautions to prevent floods.

In the case of artificial watercourses, the rights of the adjoining owners depend solely on contract, or grant, or prescription (as to which see *Simpson v. Godmanchester Corporation*, [1897] App. Cas. 696), and an owner is entitled to keep flood-water off his own lands as best he can, regardless of the effect on his neighbours, so long as he does not interfere with any natural outlet for the water (*Nield v. L. & N.-W. Rwy. Co.*, 1874, L. R. 10 Ex. 4). But when the water is once on, he cannot turn it off on to his neighbour (*Whalley v. L. & Y. Rwy. Co.*, 1884, Q. B. D. 131); and where artificial erections on land divert water on to the land of another, this is not regarded as natural user, and the owner of the erection is liable for damage by the water diverted (*Herdman v. N. E. Rwy. Co.*, 1876, 2 Ch. D. 692).

The question of flooding from subterranean watercourses arises equally with reference to mines and drains. The owners of upper mines are not liable to owners of lower mines for flooding caused by the escape of water from the upper strata by the natural course of drainage, but in consequence of proper mining operations in the upper strata (*Williamson v. Waddell*, 1876, 2 App. Cas. 95). But where mining operations involve the pumping up of water from a lower to a higher level, and consequent damage by percolation, or the letting a stream into a lower mine, they are not regarded as the natural and ordinary uses of land for mining, and expose the operator to liability for any flooding to lower mines thereby caused (*Baird v. Williamson*, 1864, 15 C. B. N. S. 376; *Fletcher v. Smith*, 1877, 2 App. Cas. 781; *Crompton v. Lea*, 1874, L. R. 19 Eq. 115; *Young v. Bankier Distillery Co.*, [1893] App. Cas. 691).

When water or any other mischievous agency is brought by any person on to his land for his own purposes, he must keep it there, and if it escapes and floods the lands of others, he is liable for the damage done, even in the absence of negligence, unless he acted under statutory authority (*Rylands v. Fletcher*, 1868, L. R. 3 H. L. 330; *Geddis v. Bann Conservators*, 1878, 3 App. Cas. 430, 431). The act of God or the Queen's enemies, e.g. an unprecedented flood or acts of war, is also a defence in such a case (*Nicholls v. Morsland*, 1875, L. R. 10 Ex. 255; 2 Ex. D. 1; *Box v. Jubb*, 1879, 4 Ex. D. 76). Negligence must be shown where the authority for collecting the water is statutory: e.g. where the main of a water company or a public sewer bursts, owing to negligence in construction or maintenance (*Green v. Chelsea Waterworks*, 1895, 70 L. T. 547).

The whole subject of civil liability for flood is fully and exhaustively discussed in Beven on *Negligence*, 2nd ed., bk. ii. c. 4, "Sewer," p. 449, bk. iii. c. 2, "Water and Watercourses."

The Malicious Damage Act, 1861, furnishes four classes of offences with respect to floodgates, sluices, etc.

Two are felonies: (1) Unlawfully and maliciously destroying floodgates in a harbour, port, dock, reservoir, or on or belonging to a navigable river (24 & 25 Vict. c. 97, s. 36). (2) Unlawfully and maliciously opening or drawing up a floodgate or sluice on a navigable river or canal, with intent to prevent or obstruct the construction, maintenance, or carrying on the navigation (s. 31).

Two are misdemeanours: (3) Unlawfully and maliciously destroying the dam or floodgate of a mill-pond, reservoir, or pool (s. 32). (4) Unlawfully, etc., destroying the dam, or floodgate, or sluice of a fish-pond, or private

water, or water in which there is a private fishing, with intent to take or destroy the fish (s. 32; 36 & 37 Vict. c. 71, s. 13).

The punishment is penal servitude for three to seven years (or, in the case of the first felony, for life), or imprisonment with or without hard labour for not over two years. Males under sixteen may also be sentenced to whipping.

In the case of a right, by grant or prescription, to send down water or sewage over, under, or past the land of another, the amount to be sent is usually limited, and if it is exceeded, the owner of the servient tenement is entitled to stop the passage of any water till the owner of the dominant tenement restricts his user within its proper limits (*Cawdwell v. Russell*, 1856, 26 L. J. Ex. 34).

The obligation to keep up artificial banks and walls, so as to keep fresh or salt water out of the lands of others, rests on contract or prescription, or the provisions of a commission of sewers (*Hudson v. Tabor*, 1876, 2 Q. B. 1). 290; *Nitro-phosphate and Odam's Chemical Manure Co. v. London and St. Katharine's Dock Co.*, 1878, 9 Ch. D. 503; *Fobbing Level Commissioners v. R.*, 1886, 11 App. Cas. 449, and the authorities there cited).

It is said to be the prerogative and duty of the Crown to maintain the realm against inroads of the sea, by maintaining natural or erecting artificial banks, (*A.-G. v. Tomline*, 1880, 14 Ch. D. 58; *West Norfolk Farmers' Manure Co. v. Archdale*, 1886, 16 Q. B. D. 754).

The case of a nuisance by flooding caused by the insufficiency of sewers or drains, made by or vested in a public authority, appears to impose no liability on the public body in the absence of negligence in their construction or maintenance (*Stretton's Derby Brewery Co. v. Derby, Mayor, etc.*, [1894] 1 Ch. 431; *Robinson v. Workington, Mayor, etc.*, [1897] 1 Q. B. 619; *Peebles v. Oswaldtwistle Urb. Dist. Council*, [1897] 1 Q. B. 625); *Whitfield v. Bishop Auckland Urb. Dist. Council*, [1897] 14 T. L. R.).

Flotsam, Jetsam, and Lagan.—These are the names for various kinds of wreck (though not wreck proper, *q.v.*) found at sea. "*Flotsam* is when a ship is sunk or otherwise perished and the goods float upon the sea; *jetsam* is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish" (Blackstone's definition is, "where goods are cast into the sea and sink and remain under water," i. *Com.* 305 (1841)); "*lagan, vel potius ligan*, is when the goods which are so cast into the sea and afterwards the ship perishes, such goods that are so heavy that they sink to the bottom, and the mariners to the intent to have them again tie to them a buoy or cask or such other thing that will not sink, so that they may find them again. None of these goods which are so called are called wreck so long as they remain in or upon the sea; but if any of them by the sea be put upon the land, then they shall be said wreck. Nothing shall be said to be *wreccum maris* but such goods as are cast or left upon the land" (*Sir Henry Constable's case*, 1599, 5 Co. Rep. 106). Hale states the law in the same way: "They are not wreck of the sea [*i.e.* wreck proper] but of another nature, neither do they pass by grant of *wreccum maris* [*R. v. Forty-Nine Casks of Brandy*, 1836, 3 Hag. Adm. 257; *R. v. Two Casks of Tallow*, 1837, *ibid.* 294] . . . but they are styled *adventuræ maris*. And as they are of another nature so they are of another cognisance or jurisdiction, viz. the Admiral's [see ADMIRALTY]. These and other sea estrayes if they are taken up in a wide ocean belong to the taker of them if the owner cannot be

known. But if they are taken up within the narrow seas that do belong to the king, or in any haven, port, or creek, or arm of the sea, they do *prima facie* and of common right belong to the king, in case where the ship perisheth or the owner cannot be known. . . . But if the owner can be known he ought to have his goods again, for the casting them overboard is not a loss of his property [if he claims them within a year and a day, per Sir L. Jenkins, *Life*, i. 89]. . . . A subject may be entitled to these *adventuræ maris* as he may be entitled to wreck, viz. by charter or by prescription [e.g. Lord Warden of Cinque Ports, *Lord Warden and Admiral of Cinque Ports v. King in his Office of Admiralty*, 1831, 2 Hag. Adm. 438]. And it is agreed in the case of *Sir Henry Constable* that a man may have flotsam, etc., by prescription between high water and low water mark. Some of the West country prescribe to have it as far as they can see a Humber barrel. And much more may it be had by prescription in an arm of the sea; accordingly the barons of Berkeley have ever had it in the river Severn over against their barony. These liberties of wreck, flotsam, etc., may be parcel of or belonging to a hundred or manor" (*De Jure Maris*, ch. vii.; Moore, *Foreshore*, 410, 411). The right to wreck or flotsam in a manor is a presumption that the shore belongs to the grantee of them (see *FORESHORE*). Flotsam, jetsam, and lagan are now included in the term "wreck" in the Merchant Shipping Act, 1894, and are therefore for most purposes equivalent to wreck (s. 510). See *WRECK*.

Flowers.—See *LARCENY*; *MALICIOUS DAMAGE*.

Flowing Water.—See *WATER*.

F. O. B.—These letters in a contract of sale relating to goods which are to be sent by sea denote that the goods are sold at a price which includes the cost of delivery on board the ship. Under such a contract the goods are at the buyer's risk directly they are shipped, and he pays the freight and insurance upon their carriage (*Inglis v. Stock*, 1885, 10 App. Cas. 263), which under a *c. f. i.* contract (*q.v.*) are included in the price. The property in the goods shipped under such a contract passes to the buyer upon shipment, whether the ship be a general or a chartered one (*Cowasjee v. Thompson*, 1845, 5 Moo. P. C. 173; *Browne v. Hare*, 1858, 3 H. & N. 485, and 4 *ibid.* 822; *Ex parte Rosencar China Clay Co.*, 1879, 11 Ch. D. 560); though until they are actually delivered into the possession of the buyer or his agents the seller can stop them *in transitu* (*q.v.* and *ibid.*). It has been held that by the usage of a particular trade warrants for goods deliverable *f. o. b.* to a buyer or his assigns by indorsement pass the property in the goods to the buyer on his giving value for them, free from the seller's lien (*Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, 1877, 5 Ch. D. 205).

Fodder.—Where a servant, contrary to his master's orders, takes fodder belonging to his master from his possession to feed animals belonging to or in the possession of the master, he is guilty of misdemeanour and not of larceny. The offence is ordinarily prosecuted summarily; but in a proper case the servant may be convicted of this offence on a charge

of stealing the fodder from his master (26 & 27 Vict. c. 103, s. 1). See *Archb. Cr. Pl.*, 21st ed., 380; and LARCENY.

Foenus Nauticum.—See BOTTOMRY, vol. ii. p. 221.

Folcland; Folkland.—Under the Anglo-Saxon constitution the folcland was the public land which had not been assigned to individuals or communities, either on the original allotment, or subsequently granted by charter or book. It could not be alienated without the consent of the national council, but it might be so granted to be held in estates for life or lives, and be subject to testamentary disposition; but the ownership still remained in the State, and the proceeds went to the revenue. The holders were subject to rents and other services in addition to the obligations to the State which were imposed on all holders of land; and these special obligations gave rise to a special jurisdiction of the king, which was administered by royal officers in the hundred Court; though the lands were rather within the peace of the king than in that of the hundred. Upon grant, however, the jurisdiction passed to the grantee.

The consent of the national council upon alienation in time became a mere form, the folcland became virtually the king's, and part of the royal demesne. The holders, therefore, then stood in the relation of the king's vassals, who were especially liable to be summoned to the host at the king's call, not merely for national defence, as all subjects were, but for general service apart from the local military organisations. See BOCLAND.

[*Authority.*—Stubbs, *Constitutional History*, vol. i. ch. vii. *passim*.]

Folcmote; Folkmoot.—Any assembly of the Anglo-Saxon people in the Courts, such as the hundred or shire Court, for legislative or judicial purposes. The witenagemot (*q.v.*) was not a folkmoot, but the council of the chiefs of each kingdom, or of an aggregation of kingdoms, and finally of the united nation. The shiremoot became, after the tenth century, a judicial body only, but up to that time there remained some traces of its functions as a legislative body, and, as such, it was a popular representative body attended by the representatives of the hundreds and townships.

[*Authorities.*—Stubbs, *Constitutional History*, vol. i. chs. v. and vi. *passim*; and *Select Charters*, 8th ed., pp. 9, 10.]

Folcright; Folkright.—The law, civil and criminal, of the Anglo-Saxon kingdoms administered either in the separate kingdoms, or collected in such compilations as those of Edward the Confessor out of the separate laws, and applied as a law common to the whole realm. They form the basis of the common laws of England.

[*Authorities.*—Blackstone, i. p. 67; Stubbs, *Constitutional History*, vol. i. ch. v.; and *Select Charters*, 8th ed., p. 60.]

Folio.—In its legal sense, "folio" denotes a certain number of words in a legal document. In conveyances there are seventy-two words, every figure comprised in a column, or authorised to be used, being counted as one

word (R. S. C., Order 65, r. 27 (14)), and in parliamentary proceedings ninety, to the folio.

Font.—When immersion in baptism (see article BAPTISM) fell into disuse, fonts were set up at the entrance of churches.

A constitution of St. Edmund, Archbishop of Canterbury (Lindwood, p. 241), in the thirteenth century, provides that every church should have a font of stone or of other suitable material, which is to be decently covered, reverently treated, and not put to any other use. Canon 81 of the Canons of 1603 runs—"According to a former constitution, too much neglected in many places, we appoint that there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places. In which only font the minister shall baptize publicly."

The Union of Benefices Amendment Act (34 & 35 Vict. c. 90, s. 5) provides that the font of any disused church shall be transferred to such parish church as in that Act provided.

[*Authorities.*—Lindwood, *Prov.*; Phillimore, *Eccl. Law*, 2nd ed.]

Food.—See ADULTERATION; BAKEHOUSES; BREAD; FERTILISERS AND FOOD STUFFS.

The general incidents and consequences attaching to contracts for the sale of food are contained in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 17). The definition of quality in that Act includes "state and condition of the goods sold" (s. 61 (1)). The decisions prior to the Act suggest that on the sale of food there is an implied warranty of its fitness for human consumption (*Emmerton v. Matthews*, 1862, 31 L. J. Ex. 139; *Burnby v. Bollett*, 1848, 16 Me. & W. 644; *Beer v. Walker*, 1877, 46 L. J. C. P. 677; *Barrows v. Smith*, 1894, 10 T. L. R. 246); but the question has not yet arisen under the Act. As to sale on Sundays, see SUNDAY.

The old law with reference to the sale of food is contained in Hawk., P. C., bk. i. c. 80, as to price and measure, and in c. 64, and Burn's *Justice*, 17th ed., as to the assizes of bread and ale. It was administered in the main by the now abolished Courts leet (see 5 *Seld. Soc. Publ.* pp. 50, 51, 60, 80). In the public interests statutory provisions have been made which supersede the old assizes of bread and ale, and give summary remedies for breaches of their regulations.

Adulteration.—The sale of food which is adulterated, i.e. not of the substance or quality demanded by the buyer, is dealt with under ADULTERATION, and the special headings BEER, BREAD, CHICORY, COFFEE, TEA. The Bread Act, 1836 (6 & 7 Will. IV. c. 37, s. 8), differs from the Sale of Food and Drugs Acts in requiring evidence that a baker knew of the use of the ingredients forbidden by the Act (*Core v. James*, 1871, L. R. 7 Q. B. 135; *Pain v. Boughtwood*, 1890, 24 Q. B. D. 353).

Weight and Measure.—As to the law with respect to the weighing, etc., of food, see WEIGHTS AND MEASURES.

Wholesomeness.—At common law it is an indictable misdemeanour to possess or expose for sale or to sell food unfit for human consumption (*R. v. Muckarty*, 1804, 6 East, 133; *R. v. Trew*, 2 East P. C. 821; *R. v. Dixon*, 1814, 3 M. & S. 11; 15 R. R. 301; *R. v. Haynes*, 1815, 4 M. & S. 214; *Shillito v. Thompson*, 1875, 1 Q. B. D. 12); and if the sale was made with knowledge of the condition of the food, and death ensue by eating

the food, the seller may be indicted for manslaughter (*R. v. Stevenson*, 3 F. & F. 106; *R. v. Kempson*, 1893, Oxford Circuit, 28 L. J. 477).

In the county of London under sec. 47 of the P. H. London Act, 1891 (54 & 55 Vict. c. 76), summary proceedings may be taken for the seizure, condemnation by a magistrate, and destruction of any animal and of any article, solid or liquid, intended for human food, which is diseased, unsound, or unwholesome, or unfit for human food.

In other parts of England almost similar remedies are given by secs. 116-119 of the P. H. Act, 1875, which are not so wide in their scope as the London Act, and deal only with animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour, and milk. But they may be extended to all articles intended for the food of man, sold or exposed for sale, or deposited in any place for sale, or in preparation for sale, by adopting sec. 28 of P. H. Act, 1890 (53 & 54 Vict. c. 59).

The course of procedure is substantially the same under both sets of enactments. The medical officer of health, or a sanitary inspector, may inspect and examine food exposed for sale, or deposited for sale, or in preparation for sale, and if satisfied that it is diseased, etc., may seize it and carry it before a justice for condemnation.

The entry to examine and seize may be at any reasonable time apparently, even on a Sunday (*Bickley v. Small*, 1875, 32 L. T. 726). The food must on seizure be taken before a justice with all reasonable speed (*Burton v. Bradley*, 1887, 51 J. P. 118; *Bater v. Birkenhead (Mayor, etc.)*, [1893] 2 Q. B. 77). The justice may either condemn on his own view and smell without hearing the owner (*Redfern v. White*, 1879, 5 Q. B. D. 15), or may hear the owner before acting, and take his evidence (*Wage v. Thompson*, 1885, 15 Q. B. D. 342). If he declines to condemn the goods, they are returned to the owner, who, outside London, is entitled to compensation for any deterioration consequent on the seizure, and the expense, if any, of resisting the application to condemn the food (*Bater v. Birkenhead, (Mayor, etc.)*, [1893] 2 Q. B. 77). There does not seem to be any corresponding provision as to London.

On the condemnation of the food, proceedings may be taken in London against the person to whom the food belongs or did belong at the time of sale or exposure for sale or deposit for the purpose of sale, or in whose possession or on whose premises it was found, who is liable on summary conviction to a fine not exceeding £50 (for each animal or article, or if it consists of fruit, vegetables, corn, bread, or flour, for every parcel, condemned) or imprisonment, with or without hard labour for not over six months (54 & 55 Vict. c. 76, s. 47 (e)). The accused can elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17). Where food is seized in the possession of the purchaser which was sold by the seller in a state rendering it liable to seizure and condemnation, the seller is liable to the penalties, unless he can show that he did not know and had no reason to suspect its condition (s. 47 (3); *Billing v. Prebble*, 1896, 66 L. J. Q. B. 180).

In the case of a second conviction within a year, the Court may order a notice of the conviction to be fixed on the premises of the offender (s. 47 (4)).

A fruit broker has been held to have protected himself from the penalties by a condition of sale that the unsound portions of fruit sold in parcels should be sorted out and destroyed by the buyer, and not offered for sale to the public (*R. v. Dennis*, [1894] 2 Q. B. 458).

In London a person who has in his possession an article which is unwholesome or unfit for human food can by written notice require the sanitary authority to remove it as trade refuse (s. 47 (8)).

In the rest of England proceedings can be taken against the person to whom the condemned food belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found (*Newton v. Monkcorn*, 1889, 53 J. P. 692). The maximum penalty is £20 per animal or article, or three months' imprisonment (38 & 39 Vict. c. 55, s. 117). Under this enactment there must be exposure for sale at the time of seizure (*Vinter v. Hind*, 1883, 10 Q. B. D. 63; *Barlow v. Jewett*, [1891] 2 Q. B. 107), unless the food was merely deposited for the purpose of sale (*Mallinson v. Carr*, [1891] 1 Q. B. 48). Personal knowledge is not an essential element in the offence (*Blaker v. Tillstone*, [1894] 1 Q. B. 345).

Footbridge.—1. Footbridges occasionally exist as part of a highway at a ford (see *R. v. Yorkshire West Riding*, 1770, 5 Burr. 2594, 2595). Whether they are repairable as county bridges depends on their dedication and utility (Glen on *Highways*, 2nd ed., 110); but they may be repairable, *ratione tenuræ*, by occupiers of the lands in which they are, or by prescription by the parishioners (*ibid.* 121). Any considerable alteration or enlargement of the bridge appears to take away the prescriptive obligation, and to impose the duty of repair on the highway authority for the road in which the bridge is.

2. Railways are bound, under sec. 46 of the Railway Clauses Act, 1849, to make footbridges to carry footways over their line, unless they can get the consent of justices to a level crossing, or prefer to carry the way under the line. The repair of the bridges falls on the railway company. See RAILWAYS.

Footpath.—A public footpath or footway is a highway open to all the Queen's subjects alike, for passage on foot only. It is distinct from footpaths which are private or reserved for a particular class of person, e.g. an occupation way, for use by occupiers of certain tenements, or inhabitants of a particular parish. In certain cases, roads, which are occupation roads only for horses or carriages, may be public footways.

Public footpaths are created (1) by dedication express or presumed of the right of passage; (2) by statute. The modes of dedication are dealt with under HIGHWAYS. Footways are not infrequently created by Inclosure Acts, and the awards made under them (e.g. *Pullin v. Reffell*, 1891, W. N. 39).

Under sec. 13 (2) of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the parish council or parish meeting are entitled to spend money on those public footpaths of the parish which do not run along a public carriage road; and under sec. 13 (1) the consent of the parish and the district councils is necessary to authorise the stopping or diversion of any public footpath. The only lawful mode of closing or diverting is under sec. 84 of the Highway Act, 1835, or the powers of some special statute (*Rangleley v. Midland Rwy. Co.*, 1868, L. R. 3 Ch. App. 306). See HIGHWAYS. In urban districts the council may act under sec. 144 of the P. H. Act, 1875, without reference to the electors or ratepayers.

Under sec. 26 of the Act of 1888, the district council of any district, urban or rural, is authorised to protect all public footways and to prevent their obstruction. This power may be exercised either by indicting for the obstruction, or by suing for its abatement in the name of the Attorney-

General (Glen on *Highways*, 2nd ed., 1842), or by abating it without legal process, and in the latter case the costs of abatement can be recovered from the obstructor (*Reynolds v. Presteign Urban District Council*, [1896] 1 Q. B. 624; *Louth Urban District Council v. West*, 1896, 65 L. J. Q. B. 585). If the district council fail to take action on complaint of the parish council, the County Council on petition from the parish council can take over the powers and duties of the district council (s. 26 (4)). These powers merely provide for action by a public body at the public expense, and do not exclude the right of any member of the public to pull down an illegal obstruction or to indict the obstructor.

The repair of footways to public carriage ways falls on the district council as the highway authority, and in the case of main roads even in boroughs on the County Council (*In re Burslem Corporation and Staffordshire Council*, [1896] 1 Q. B. 24). As to footways in London, see LONDON (COUNTY) *Streets*.

Level crossings by railways over footways are regulated by secs. 46, 62 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), as modified by the special Acts of each railway undertaking.

This subject is very fully treated in Hunter on *Open Spaces*, 1896, pp. 253–296. *See also Glen on *Highways*, 2nd ed., *passim*.

Footway.—See FOOTPATH.

For.—The word “for” was read as meaning “for the purpose of” in *A.-G. v. Sillem*, 1864, 33 L. J. Ex. 209, 213; and in *Marshall v. Richardson*, 1889, 58 L. J. M. C. 45.

If one promises to do one thing “for” another thing, the word “for” imports that the doing of such other thing is a condition precedent to the performance of the one promised, unless a contrary intention appears (*Thorp v. Thorp*, 1701, 12 Mod. 460, 461).

Signing “for” another makes such other person, if anyone, liable on the document (*Aggs v. Nicholson*, 1856, 1 H. & N. 165), unless by the custom of a particular trade the signatory is also liable (*Pike v. Ongley*, 1887, 18 Q. B. D. 708). Where two directors and the secretary of a company which had no power to accept bills, accepted one “for and on behalf of” the company, it was held that they were liable for the false representation of fact that they had authority to accept the bill (*West London Commercial Bank v. Kitson*, 1884, 13 Q. B. D. 360).

A photograph is not made “for or on behalf of” a person within the meaning of the proviso to sec. 1 of the Fine Arts Copyright Act, 1862, where such person makes no payment to the photographer, and it is the intention of the parties that the photographer shall keep the negative and have the right to sell copies (*Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531).

See also Stroud, *Jud. Dict. s.v. “For.”*

Forbearance.—As to forbearance being a sufficient consideration for a contract, see CONTRACT, vol. iii. pp. 339, 340.

Force and Arms.—Under the common law system of pleading, it was necessary, in counts for misdemeanour or civil trespass, to insert the

words, with "force and arms" (*vi et armis*) "and against the peace" (*et contra pacem*), and if the words were omitted, the count was demurrable (*Day v. Edwards*, 1794, 5 T. R. 648; 3 Chitty, *Pl.*, 7th ed., 536).

Prior to 1546 it was usual not only to insert these words in felony indictments, but also to specify particular weapons as carried by the offenders. The specification was rendered unnecessary by 37 Hen. VIII. c. 8, but was continued where it could be proved an aggravation of the offence (*Hawk.*, P. C., bk. ii. c. 25, ss. 90, 91; and see bk. i. c. 76, s. 245, as to indictments for nuisance to highways). See FORCIBLE ENTRY.

The insertion of these words was rendered unnecessary in criminal pleadings by 14 & 15 Vict. c. 100, s. 24, and in civil proceedings by sec. 49 of the C. L. Procedure Act, 1852 (15 & 16 Vict. c. 76).

Forcible Entry and Detainer.—1. As to entry for purposes of justice, see ARREST; EXECUTION; SHERIFF.

2. A person whose goods have been wrongfully taken is, it is said, entitled to use force to recover them from the wrong-doer if he refuses to give them up (2 *Hawk.*, P. C., bk. i. c. 64, s. 1). But a person who was disseised of his lands could, it is said, at common law in most cases lawfully regain possession by force.

3. It is also said that forcible entry on and detainer of lands is a common law misdemeanour, and a form of indictment is given in Archbold, *Cr. Pl.*, 21st ed., 969. These two statements are difficult to reconcile, and the latter rests only on a dictum of Wilmot, J., in *R. v. Bake*, 1765, 3 Burr. 1731; and it was held in *R. v. Stow*, 1765, 3 Burr. 1698, that an indictment will not lie for a mere civil trespass, although in civil as well as criminal proceedings for trespass the words "by force and arms and against the peace" were then necessary (2 Poll. & Mait. *Hist. Eng. Law*, 515). If the entry was made by three or more it would be a RIOR (*Dalton, Country Justices*, c. 44), and the case of *R. v. Wilson* (1799, 8 T. R. 357; 4 R. R. 694) can be justified on this ground, and the note, p. 364, expressly limits the judgment to forcible entry without any title, and avoids contradicting the dicta of Hawkins as to forcible entry on legal title (bk. i. c. 64, s. 1). But the indictment at common law seems to have been regarded as convenient in cases falling short of riot where it was desired to call the prosecutor as a witness (*R. v. Williams*, 1829, 9 Barn. & Cress. 549), as he was held interested and incompetent, in proceedings under this statute until the change in the law of EVIDENCE. It is difficult to suppose that the statutes now to be mentioned would have been passed except to supplement the defects of the common law.

In 1381 (5 Rich. II. c. 7) it was enacted that "none shall from henceforth make any entry into any lands and tenements but in case where entry is given by law; and in such case not with strong hand (*a forte main*), nor with multitude of people, but only in peaceable and easy manner. And if any man henceforth do to the contrary and be thereof duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed [*i.e. fined*] at the king's will." The offence is triable at Quarter Sessions.

The statute was, in 1391 and 1393 (15 Rich. II., 17 Rich. II. c. 8), confirmed and extended to other possessions and ecclesiastical benefices, and in 1429 (8 Hen. VI. c. 9) extended to forcible detainer of possession, whether the entry was or was not forcible. In 1624 (21 Jas. I. c. 8, s. 4) a practice of removing indictments for forcible entry, so as to delay or prevent trial and conviction, was discouraged by a provision as to requiring a recognizance

from the defendant before the writ of *certiorari* is allowed, *i.e.* acted on by the Court of Quarter Sessions.

An entry to be forcible within the statutes must be something more than a mere civil trespass (*R. v. Stow*, 1765, 3 Burr. 1698; *R. v. Smyth*, 1832, 5 Car. & P. 201). It must be made for the purpose of taking possession, and in a violent manner and not merely by a trick, whether the violence consists in actual force or such a show of force as to prevent resistance, or threats of personal violence, or breaking open a house, or collecting together an unusual number of persons to effect the entry (*Steph. Dig. Cr. Law*, 5th ed., p. 61). A detainer is forcible if it follows on a wrongful entry, whether forcible or not, if it is accomplished in a manner which as to an entry would be forcible. The existence of a right of entry is no defence to an indictment if the entry was made forcibly by the defendant, and not with the aid of the officers and under the authority of a Court of justice.

The offence is not committed where the entry is made upon lands in the possession of a bailiff or servant of the defendant, since such possession is that of the master; but is committed where one joint-tenant or tenant in common forcibly ousts another (*Hawk.*, P. C., bk. i. c. 64, ss. 32, 33). It is committed where a landlord forcibly takes possession of premises when a tenant's term has expired (*Taunton v. Costar*, 1798, 7 T. R. 431; 4 R. R. 481; but see *Jones v. Foley*, [1891] 1 Q. B. 730).

It is not clear how far the statutes extend to incorporeal hereditaments (see Russell on *Crimes*, 6th ed., vol. i. p. 721). But they apply not only in the case of persons in possession of freeholds, but also to copyholds or customary freeholds, to leaseholds for years, and to tenancies by *elegit*. In some of the old precedents the indictment avers not only in whom the freehold is, but also the possession of tenants under lease or copy of Court roll.

The old controversies (Russell on *Crimes*, 6th ed., vol. i. p. 727) as to the form of an indictment for forcible entry are not of importance since 14 & 15 Vict. c. 100, s. 1; but it is necessary to identify the property in question, and in the case of a charge under the statute to use some of the words of the statute, and in the case of a common law indictment to allege sufficient force to show a riot or more than a mere civil trespass.

It is usual to set out the title of the person ousted with sufficient fulness to entitle the Court to award a writ of restitution (Russell on *Crimes*, 6th ed., vol. i. p. 726), but it is not necessary to allege or prove more than the prosecutor's possession, and the title, if set out, cannot be impeached by the defendant. The statements in Russell on *Crimes*, 6th ed., vol. i. p. 726, seem to rest on an imperfect reading of the statutes and confusion between the conditions needed for an indictment and those required to justify a writ of restitution. All the prosecutor need show is that for civil purposes the legal possession was in him at the date of entry (*Lows v. Telford*, 1876, 1 App. Cas. 414; *R. v. Smyth*, 1832, 5 Car. & P. 201; *R. v. Child*, 1846, 2 Cox C. C. 102; *R. v. Dillan*, 1817, 2 Chit. K. B. 314; *R. v. Hoare*, 1817, 6 M. & S. 266; 18 R. R. 368). Absence of title in the prosecutor is no defence to an indictment for forcible entry, the gist of it being the public force (*R. v. Studd*, 1866, 14 W. R. 806). A licence by tenant to landlord to eject him without process of law is void, and no answer to a charge of forcible entry (*Edwick v. Hawkes*, 1881, 18 Ch. D. 199). But it has been held in *Browne v. Dawson*, 1840, 12 Ad. & E. 624, and *Scott v. Brown*, 1885, 51 L. T. 747, that the owner of property could forcibly eject a mere trespasser.

Under 15 Rich. II. c. 2 and Hen. VIII. c. 9, justices are given a sum-

mary jurisdiction to convict on their own view: (1) on a forcible entry; (2) on a forcible detainer after an unlawful, even if peaceable, entry. They have a discretion not controllable by mandamus (*Ex parte Davy*, 1842, 2 Dow. P. C. N. S. 24). But it has rarely been exercised, and their convictions under this power are narrowly scrutinised and usually quashed (*R. v. Oakley*, 1832, 4 Barn. & Adol. 307; *R. v. Wilson*, 1834, 1 Ad. & E. 627, 1835, 3 Ad. & E. 817; *Attwood v. Joliffe*, 1848, 3 New Sess. Cas. 116).

Restitution of possession to the person disseised may be awarded, as to freeholds under the earlier Acts, and as to copyholds and leaseholds by 21 Jas. I. c. 15—(1) as a matter of discretion before trial, and after finding of an indictment under the statutes (*R. v. Hake*, 1826, 4 Mann. & Ry. 483 n.; *R. v. Harland*, 1838, 8 Ad. & E. 826); (2) after conviction, when the writ is of right, and of course. When the indictment is removed by *certiorari*, the High Court acquires the power and duties of the original Court as to issue of the writ. As to the present powers and practice of the High Court, see Short and Mellor, *Crown Pr.* p. 447.

The right to a writ of restitution is defeated by proof of three years' uninterrupted possession before indictment by the defendant, irrespective of title (8 Hen. VI. c. 9; 31 Eliz. c. 11). The civil remedy for forcible entry was under 8 Hen. VI. c. 9, by assise of novel disseisin or action of trespass for treble damages. It was taken away in 1879 (42 & 43 Vict. c. 49), and now the remedy is by action of trespass to land to which it is a defence to prove a good title even if the entry was forcible. But the defence does not cover assault or injury to goods in the course of the entry (*Beddall v. Maitland*, 1881, 17 Ch. D. 174; *Beattie v. Mair*, 1882, 10 L. R. Ir. 208).

Every forcible entry involves breach of close, and in civil proceedings the fact that an entry is forcible is merely a matter of aggravation (Bullen and Leake, *Prec. Pl.*, 2nd ed., 362 n.).

The lawful and peaceable modes of re-entering into possession of lands are dealt with under LANDLORD AND TENANT.

[*Authorities*.—Hawk., P. C., bk. i. c. 64; Bac. Abr. tit. "Forcible Entry"; Vin. Abr. do.; Burn, *Justice*, 30th ed., do.; Com. Dig. do.; Russell on *Crimes*, 6th ed., vol. i. p. 717; Archbold, *Cr. Pl.*, 21st ed., 966; Foà on *Landlord and Tenant*, 2nd ed., 518–594; Woodfall on *Landlord and Tenant*, 15th ed., 1894, 892.]

Foreclosure.—Foreclosure in theory, at least, is merely a decree determining the equitable right of a mortgagor to redeem after the mortgagee's estate has become absolute at law (see *Bonham v. Newcomb*, 1806, 1 Vern. 232; *Sampson v. Pattison*, 1842, 1 Hare, 533; *Carter v. Wake*, 1877, 4 Ch. D. 605); and as enforcing a personal contract may be of lands out of the jurisdiction (*Payet v. Ede*, 1874, L. R. 18 Eq. 126).

A mere charge does not give right to a foreclosure whether by will (*In re Owen*, [1894] 3 Ch. 220) or by deed (*Trenchard v. Tennant*, 1869, L. R. 4 Ch. 537; see also *Stamford Banking Co. v. Ball*, 1862, 4 De G., F. & J. 310). Speaking generally, the owner of an equitable charge or lien as a security has a right to a judicial sale (per Lindley, L.J., *Marshall v. South Staff. Tramways Co.*, [1895] 2 Ch. 50).

However, it has been held that debenture-holders of an ordinary limited company were entitled to foreclosure, although the debentures merely charged the property (*Sadler v. Worley*, [1894] 2 Ch. 170; see also *Welch v. National Cycle Co.*, 1886, W. N. p. 97, set out in Palmer's

Company Precedents, 6th ed., p. 908; and also *Oldrey v. Union Works Co.*, 1895, W. N. 77; 72 L. T. 627). But foreclosure will only be decreed when all debenture-holders are parties, otherwise sale (see *In re Continental, etc., Co.*, [1897] 1 Ch. 511).

So a judgment creditor has been held entitled (*Jones v. Bailey*, 1853, 17 Beav. 582; *Messer v. Boyle*, 1856, 21 Beav. 559; per Stirling, J., *In re Owen* [1894], 3 Ch. p. 227; *Beckett v. Buckley*, 1874, L. R. 17 Eq. p. 435; but see contra, *Wills v. Kilpin*, 1875, L. R. 18 Eq. 299).

As regards mortgages by deposit with an express agreement to execute a legal mortgage, the mortgagee is clearly entitled to foreclose (*Underwood v. Joyce*, 1861, 7 Jur. N. S. 566); and in modern cases it has been held that a mortgagee by deposit without any memorandum is entitled to foreclosure, and that apart from statutory power this is his proper remedy, and not sale (*James v. James*, 1873, L. R. 16 Eq. 153; *Backhouse v. Charlton*, 1878, 8 Ch. D. 448). These cases involve the doctrine that a deposit by deeds implies a contract to execute a legal mortgage which in older cases was treated as doubtful (see per Lord Cranworth in *Roberts v. Croft*, 1857, 2 De G. & J. 1; *Matthews v. Goodden*, 1862, 31 L. J. Ch. 282). And as observed in Ashburner on *Mortgages*, p. 337, in the cases of *James v. James* and *Backhouse v. Charlton*, *ubi supra*, the judges relied on *Pryce v. Bury*, cited in a note to *James v. James* (see L. R. 15 Eq. p. 153), and reported in 23 L. J. Ch. p. 676; 17 Jur. p. 1173, s.c. 18 Jur. 967; 1853, 2 W. R. pp. 6 and 216; 1853, 2 Dr. 11 and 41, from which it appears there was an agreement to execute a legal mortgage by one brother of the mortgaged property, which was not noticed in *James v. James*, *ubi supra*, and this may raise a doubt whether the cases support the doctrine, but the interest of the brother who had signed this agreement was that of tenant in tail, and had determined and had descended to the other brother who had only signed at the foot, the words "I join in the deposit" without more, so it may be argued that the case may be properly treated as an authority for the doctrine. However this may be, the judges did not in any way rest their judgments on the memorandum, and it seems to be generally treated as clear that a deposit implies an agreement to create a legal mortgage. See Seton, ed. 1893, p. 117; Fisher on *Mortgages*, 3rd ed., 510, 4th ed., p. 480, and 5th ed., p. 477; per Jessel, M. R., in *Carter v. Wake*, 1877, 4 Ch. D. 606; per Lord Romilly, *Smith v. Watson*, 5 N. R. 395; *Mellor v. Porter*, 1883, 25 Ch. D. 159; *Wade v. Wilson*, 1882, 22 Ch. D. 235; *Oldham v. Stringer*, 1884, 33 W. R. 251; and per Stirling, J., *In re Owen*, [1894] 3 Ch. 227; but see in Ashburner on *Mortgages*, p. 337.

A mere pledge does not give right to foreclosure (*Carter v. Wake*, 4 Ch. D. 605), but a transfer of shares in a railway company does (*General Credit, etc. v. Glegg*, 22 Ch. D. 549).

A Welsh mortgage, *i.e.* giving mere right to receive the income until debt is satisfied, does not give right to foreclosure (*Longuet v. Scruven*, 1749, 1 Ves. 402; *Balfe v. Lord*, 1842, 2 Dr. & War. 480).

A mortgage by trust for sale does not give right to foreclosure (*Schweitzer v. Mayhew*, 1860, 31 Beav. 37; *Kirkwood v. Thompson*, 1865, 2 H. & M., per V. C. W., p. 402; *Locking v. Parker*, 1872, L. R. 8 Ch. 30, L. J. James; see per Jessel, M. R., *In re Alison*, 1879, 11 Ch. D. 284).

But in *In re Alison* the Master of the Rolls said that if the mortgagor had pled a bill to redeem such a mortgage and his bill had been dismissed, he would have been foreclosed. See 11 Ch. D. p. 293.

A registered charge under the Land Transfer Act, 1875, gives a right to foreclosure (s. 26).

Though it has been held (see *ante*) that debenture-holders of an ordinary limited company were entitled to foreclosure, debenture-holders of companies with public duties are not entitled to foreclosure or sale (*Furness v. Caterham Rwy. Co.*, 1854, 25 Beav. 614; see also as to sale *Gardner v. L. C. and D. Rwy. Co.*, 1866, L. R. 2 Ch. 201; *Blaker v. Herts and Essex Waterworks Co.*, 1889, 41 Ch. D. 399; *Marshall v. South Staff. Co.*, [1895] 2 Ch. 36, and cases cited in Ashburner, p. 342).

So foreclosure is not decreed when the Crown is interested in the equity of redemption, but the Court will give leave to apply at chambers for a rule or order a sale (*Bartlett v. Rees*, 1871, L. R. 12 Eq. 395; *Hancock v. A.-G.*, 1864, 33 L. J. Ch. 661).

Proceedings for Foreclosure—Bankruptcy.—It has been held that proceedings for foreclosure need not be in the Bankruptcy Court in case of bankruptcy of either mortgagee or mortgagor (*Waddell v. Toleman*, 1878, 9 Ch. D. 212; *Ex parte Fletcher*, 1879, 10 Ch. D. 610, where the opinion was expressed that the Bankruptcy Court could not grant foreclosure; *Ex parte Hirst*, 11 Ch. D. 278; Bankruptcy Act, 1883, s. 112; *In re Champagne*, *Ex parte Kemp*, 1893, W. N. p. 153).

Infants.—Where an infant is interested in the equity of redemption, a day is given to show cause against the decree after the infant attains twenty-one (*Newbury v. Marten*, 1851, 15 Jur. 166; *Mellor v. Porter*, 1883, 25 Ch. D. 159; *Gray v. Bell*, 1882, 30 W. R. 606). But when the equity of redemption was devised in trust for sale and to divide proceeds among children, the trustees disclaiming and the legal estate descending to the eldest son and heir, it was held that he was merely a trustee and was not entitled to a day to show cause (*Foster v. Parker*, 1878, 8 Ch. D. 147). See as to practice, *Annual Practice*, 1898, p. 372.

If the mortgagor commences proceedings for redemption and his bill is dismissed or he does not pay at the time fixed in the case of an equitable mortgage, apparently he is not foreclosed (*Marshall v. Shrewsbury*, 1875, L. R. 10 Ch. 250); but except in the case of dismissal for want of prosecution, he is in the case of a legal mortgagee (*Inman v. Wearing*, 1850, 3 De G. & Sm. 729; *Marshall v. Shrewsbury*, 1875, L. R. 10 Ch. 250; *Faulkner v. Bolton*, 1835, 7 Sim. 319), and according to this case the Court is less inclined to grant him favour and open the foreclosure when he is plaintiff, than if he had been defendant to a foreclosure action (see also *Novosielski v. Wakefield*, 1811, 17 Ves. 417).

The usual order in a redemption action is, if the money is not paid by a certain time, "let this action stand henceforth dismissed out of the Court"; but the action is not dead if default be made, as it is necessary to make another application to get an absolute dismissal, and though the time fixed has passed, relief would be granted in case non-payment had been through accident or mistake (*Collinson v. Jeffrey*, [1896] 1 Ch. 644).

Proceedings for foreclosure are assigned to the Chancery Division (Judicature Act, 1873, s. 34, subs. 3), but it has been held that the venue for trial may be laid at the assizes (*Philips v. Beale*, 1884, 26 Ch. D. 621; Order 36, r. 1; but see *Powell v. Cobb*, 1885, 29 Ch. D. 486; *Reynolds v. Bishop of Liverpool*, 9 T. R. p. 46).

In any simple case where questions of priority are not involved, and an order for payment is not required, the proceedings should be by summons; otherwise the costs of an originating summons only would be allowed (*Barr v. Harding*, 1888, 36 W. R. 216).

Notwithstanding the wide terms of Order 55, r. 8, enabling the Court to "pronounce such judgment as the nature of the case may require,"

it seems that, on the authorities as they stand at present, where there is a question of priority (*In re Giles*, 1889, 43 Ch. D. 391), or where an order for payment is claimed, the action should be by writ, and the costs have been allowed even where the claim for payment has been refused (*Brooking v. Skewis*, 1887, 58 L. T. 73).

But under Order 54 a question of construction of the mortgage may be decided on summons (*In re Nobbs*, [1896] 2 Ch. 830, where the application was by the mortgagor).

Possession.—In an action by summons the usual course is to proceed under Order 55, r. 5 a, and following rules, and not under Order 15 R. S. C. 1883, for an account (see *Blake v. Harvey*, 1885, 29 Ch. D. p. 831; *Bissett v. Jones*, 1886, 32 Ch. D. 635), though orders have been made under Order 15 (see *Smith v. Davies*, 1884, 28 Ch. D. 650; 1886, 31 Ch. D. 595; *London Loan, etc., Co. v. Wall*, 30 Sol. J. 338; *Dyott v. Neville*, 1887, W. N. p. 35).

The writ or summons should ask for delivery of possession (*Best v. Applegate*, 1887, 37 Ch. D. 43; *Keith v. Day*, 1888, 39 Ch. D. 452; *Lacon v. Tyrrell*, 1874, 56 L. T. 483; see *Le Bas v. Grant*, 1895, 64 L. J. Ch. 621; 1895, W. N., where it was held that if not claimed by the writ or summons then after decree it could not be granted *ex parte*; see also *Wood v. Wheeler*, 22 Ch. D. 281). But where the rule *nisi* provides for possession it may be granted *ex parte* (*Withall v. Nixon*, 1885, 28 Ch. D. 413). So if defendant is served the delivery of possession may be included in the decree absolute though not asked for in the summons (*Best v. Applegate*, *ubi supra*).

Parties to Foreclosure Action.—All incumbrancers subsequent to the plaintiff, and all persons interested in the equity of redemption, should be parties (see Seton, 5th ed., p. 1599; *Griffith v. Pound*, 45 Ch. D. 566; see *Moore v. Morton*, 1886, 82 L. T. (Journ.) 98,—in this case a subsequent incumbrance had been discovered after decree *nisi* for foreclosure against the mortgagor, and in a second action to foreclose the incumbrance it was held that the decree could not be made without the mortgagor being a party).

An executor or trustee sufficiently represents beneficiaries. So held before the addition to the rules in 1893 (*In re Mitchell*, 1892, 65 L. T. 851; see now Order xvi. rule 8; see Ashburner, 1897, p. 530).

Judgment for Foreclosure.—In the case of a legal mortgage, there being no subsequent mortgagees, the ordinary form is for an account, and on the mortgagor paying the amount certified at a place and a time named (usually six months) the mortgagee shall reconvey and deliver deeds, and in default of payment the mortgagor be foreclosed (Seton, 5th ed., p. 1575). In the case of an equitable mortgage the word foreclosure should be inserted (*Lees v. Fisher*, 1882, 22 Ch. D. 283), with the addition that the mortgagor shall execute a conveyance to the mortgagee. A conveyance on such a judgment of an equitable mortgage requires a stamp as in an ordinary conveyance on sale of an equity of redemption (*Huntingdon v. Commissioners of Inland Revenue*, [1896] 1 Q. B. 422). As to delivery of deeds as against purchaser of equity without notice, *Heath v. Crealock*, 1874, L. R. 10 Ch. 22, but see now *In re Ingham*, [1893], 1 Ch. 352, and cases cited, 2 L. C. Eq., ed. 1897, p. 161. ••

As to attending at the place fixed for payments, see *Cox v. Watson*, 1877, 7 Ch. D. 196. See Ashburner, p. 546, and cases there cited.

As to the application to make the foreclosure absolute, see Seton, ed. 1893, p. 1656; an affidavit of non-payment or non-attendance by or on part of the mortgagor is required, and the usual form states that the mortgagor

has received nothing in the interval since decree; but Chitty, J., said this form was not compulsory, in *National, etc., Building Society v. Raper*, [1892] 1 Ch. 57; as to subsequent application for delivery of possession, see *Le Bas v. Grant*, 1895, 64 L. J. Ch. 368; *Jenkins v. Ridgley*, 1893, 68 L. T. 671.

In any application by writ the mortgagee may also obtain judgment on the account for payment (*Farrer v. Lacy, Hartland, & Co.*, 1883, 25 Ch. D. 636; 1885, 31 Ch. D. 42).

As to the date for payment when the amount is admitted or proved at the hearing, see *Farrer v. Lacy, Hartland, ubi supra*; *Hunter v. Myatt*, 1884, 28 Ch. D. 181; *Instone v. Elmslie*, 1886, 54 L. T. 730).

For judgment where an account is directed, see *Poulett v. Hill*, [1893] 1 Ch. 277; where there are collateral securities, *Dyson v. Morris*, 1842, 1 Hare, p. 423.

When there are mortgages subsequent to that of the plaintiff, if there is no question as to priorities and the subsequent incumbrancers appear, successive redemptions are usually given—six months to the first mortgagee, three months or sometimes one month to each of the others successively (see as to old practice, *Titley v. Davies*, 1743, 2 Y. & C. C. 399; and see *Beavor v. Luck*, 1867, L. R. 4 Eq. 537; *Loveday v. Chapman*, 1875, 32 L. T. 689; *Sweet v. Combley*, 1881, 25 Ch. D. 463 (n); see as to the modern practice, *Doble v. Manley*, 1885, 28 Ch. D. 664; *Platt v. Mendel*, 1884, 27 Ch. D. 246; *Coleman v. Llewellyn*, 1886, 34 Ch. D. 143, from which it appears that if either subsequent incumbrancers do not appear, or there is a question of priorities, only one period will be fixed for all without prejudice to their rights as between themselves; see also as to cases of priorities, *Bartlett v. Rees*, 1871, L. R. 12 Eq. 395; *Edwards v. Martin*, 1858, 7 W. R. 30; *General Credit, etc. v. Glegg*, 1883, 22 Ch. D. 549; *Smith v. Olding*, 1884, 25 Ch. D. 462).

So where the subsequent incumbrances were created on the same day (*Long v. Storie*, 1853, 23 L. J. Ch. 200) or they claimed under one puisne incumbrance (*Loveday v. Chapman*, 1875, 32 L. T. N. S. 689), and in the case of judgment creditor (*Bates v. Hillcoat*, 1852, 16 Beav. 139; *Stead v. Banks*, 1852, 5 De G. & Sm. 560), only one time was fixed for all.

See for a form of order in a complicated case where there was a jointure between the incumbrances, *Smithett v. Hesketh*, 1890, 44 Ch. D. 161.

Enlarging time (1) *for redemption after judgment nisi*, and (2) *after final judgment, i.e. opening foreclosure*. A distinction must be taken between these, and relief will be given in the first case more readily than the second; see the distinction pressed, probably too strongly, by the L.J., in *Patch v. Ward*, 1867, L. R. 3 Ch. 203.

Enlarging Time for Redemption.—The time for payment may be enlarged after the judgment nisi on a case being shown, but only on the terms that the mortgagee pays interest and costs already reported due (*Whalton v. Cradock*, 1836, 1 Keen, 267; *Brewer v. Austin*, 1838, 2 Keen, 211; *Elton v. Curteis*, 1881, 19 Ch. D. 49; *Finch v. Shaw*, 1854, 20 Beav. 555), even in the cases of infant mortgagors (*Coombe v. Stewart*, 1851, 13 Beav. 111); but the enlarging the time is not a matter of course,—some reason must be shown (*Nanny v. Edwards*, 1827, 4 Russ. 125). It must be shown that the estate is sufficient security (*Eyre v. Hanson*, 2 Beav. 479; see also as to enlarging time, Seton, 5th ed., pp. 1649, 1650).

There have been several cases on the question of enlarging the time where rents have been received after judgment and before it is made absolute (*Prees v. Coke*, 1870, L. R. 6 Ch. 645, where it was said by the L.J., that the final order cannot be obtained if rents have been received since

the award; *Webster v. Patteson*, 1884, 25 Ch. D. 626; *Constable v. Howick*, 1858, 5 Jur. N. S. 331; *Collinson v. Jeffrey*, [1896] 1 Ch. 646 (a redemption action); *Ross Commissioners v. Osborne*, 1890, W. N. 92; but see contra, *National Permanent, etc., Society v. Raper*, [1892] 1 Ch. 54).

Enlarging time or opening foreclosure by recovery of rents is avoided where the first order provides for an account of such moneys (see *Coleman v. Llewellyn*, 1836, 34 Ch. D. 143; *Smith v. Pearman*, 1888, 36 W. R. 681): and though North, J., refused to insert such a direction in *Cheston v. Wells*, [1893] 2 Ch. 151, it seems to have become the settled practice to do so (*Barber v. Jeckells*, 1893, W. N. 91; *Church v. Godwin*, 38 Sol. J. 10; *Lush v. Sebright*, 1894, 71 L. T. 59). The form of judgment in these cases is modified by the recent case of *Simmons v. Blandy*, [1897] 1 Ch. 19.

As to Opening Foreclosure after Decree Absolute.—A difficulty is caused by the dicta of such eminent judges as Lord Cairns, then L.J., and L.J. Rolt, on the hearing of *Patch v. Ward* on appeal. This case is reported before V.C.S. in 1862, 4 Giff. 96, and on appeal 1867, L. R. 3 Ch. 203. Some of the dicta of the L.J.J. seem to imply that foreclosure after final order enrolled could not be reopened except on proof of positive fraud, but so far as the actual judgment goes, the case on the facts appears to have been a decision merely that on an application for opening foreclosure, not by motion in the foreclosure action, but by a separate suit to set aside the decree as against one of four defendants only, on the ground of alleged constructive fraud and receipt of rents after certificate, relief would not be granted after twelve years' delay, not sufficiently explained, without proof of positive fraud or unfair pressure.

The principles on which a foreclosure will be opened are probably correctly shown by the judgment of Jessel, M. R., in *Campbell v. Holyland*, 1877, 7 Ch. D. 166. The granting relief is a judicial discretion depending on the circumstances of each case. The mortgagor must come within a reasonable time, and regard must be had to the nature of the property, whether in possession or reversion, whether of much greater value than the debt, or of special value for family or other reasons, the probability of the mortgagor getting the money, and whether there had been any accident or mistake. The case also shows that the relief may be granted in special circumstances, even as against a purchaser. See also *Thornhill v. Manning*, 1851, 1 Sim. (N. S.) 451, where a decree absolute had been made; *Jones v. Creswick*, 1839, 9 Sim. 306, where the decree had been made but not drawn up. In this case search was directed for precedents, which are given in the note, *ibid.* pp. 154 *et seq.*, some of which were of relief after order absolute, e.g. *Nanfan v. Perkins*, 1766; *Crompton v. Effingham*, 1782; *Joachim v. M'Donnall*, 1798; *Abney v. Wordsworth*, 1701; *Ismoord v. Claypool*, reported also 1666, 1 Ch. Rep. 139; *Cocker v. Bevis*, 1665, 1 Ch. Ca. 61; *Ford v. Wastell*, 1847, 2 Ph. Ch. 591, where the L.C. said enrolment of the final order made no difference, and in case of hardship the foreclosure would be opened; *Holford v. Yate*, 1855, 1 Kay & J. 677, where, though the actual application was for enlarging time, it appeared that the order had once been made absolute and reopened because the mortgagee had received rents between the date of the last certificate and the final order; and *Burgh v. Langton*, 1724, 5 Bro. P. C., Toml. ed., p. 213; where a decree of foreclosure was opened after sixteen years, according to the marginal note, on account of the equity of redemption being worth much more than was due on the security. The mortgagor was in distressed circumstances (see S. C. 2 Eq. Ca. Abr. 609).

The mortgagee may after foreclosure put in force collateral securities or

sue on the covenants, but he thereby opens the foreclosure (*Lockhart v. Hardy*, 1846, 9 Beav. 349, per Lord Langdale; see also *Tooke v. Hartly*, 2 Bro. C. C. 125, and 2 Dick. 785, discussed by Lord Langdale in his judgment, 9 Beav. 357; *Palmer v. Hendrie*, 1859, 27 Beav. 349; see also *Kinnaird v. Trollope*, 1888, 39 Ch. D. 636; *Haynes v. H.*, 3 Jur. N. S. 504). A mortgagee should realise or release collateral securities to get a valid foreclosure of the principal mortgage (*Dyson v. Morris*, 1842, 1 Hare, p. 423).

In *Watson v. Marston*, 1853, 4 De G., M. & G. 230, it seems to have been assumed that selling after foreclosure in express exercise of the powers of sale would open foreclosure; it was treated as clear, however, that the mortgagee could exercise the power; and see *In re Alison*, 1879, 11 Ch. D. 284.

As to the effect of foreclosure in giving a new estate to mortgagee, see *Heath v. Pugh*, 1881, 7 App. Cas. 235.

The Court may in any foreclosure action order sale instead of foreclosure. (Conveyancing Act, 1881, s. 25.)

As to redemption being precluded by concealment of prior mortgage, see 4 & 5 Will. & Mary, c. 16; *Stafford v. Selby*, 2 Vern. 581; *Kennard v. Futuryc*, 2 Gif. 81; Seton, 5th ed., p. 1599.

[*Authorities*.—See list of authorities appended to article MORTGAGE.]

Forecourt.—See LONDON COUNTY, *Buildings*.

Foregift.—A term applied to a premium for a lease (cp. 5 & 6 Vict. c. 108, s. 30).

Forehand Rent.—Rent payable in advance. As to payment of rent in advance, see RENT.

Foreign Action.—The rule that concurrent actions by the same plaintiff against the same defendant in respect of the same matter in two Courts in this country are *prima facie* vexatious, and that the Court will generally as of course put the plaintiff to his election and stay one of his suits,—a principle applicable where one of the actions is in the Queen's Courts in Scotland or Ireland or any other part of the Queen's dominions,—does not apply if one of the actions is in a foreign country where there are different forms of procedure and different remedies, although the Court has power to interfere in such a case under its general jurisdiction to restrain vexatious and oppressive litigation (*McHenry v. Lewis*, 1882, 21 Ch. D. 282; 22 Ch. D. 397). The subject is discussed under STAY OF PROCEEDINGS; and see, too, ABUSE OF PROCESS, and LIS ALIBI PENDENS.

Foreign Attachment is a customary process of the Mayor's Court of London, the Bristol Tolzey Court (*In re Sear*, 1881, 17 Ch. D. 74), and the Exeter Local Court (*Bruce v. Wait*, 1837, 3 Mee. & W. 15, 21; *Tross v. Michell*, 1590, Cro. (1) 172), and possibly of other ancient inferior local Courts of record. In London the custom was that when a defendant over whom the Court has jurisdiction, but who is a foreigner, i.e. not a

citizen or freeman, does not appear to a summons served on him, the plaintiff may arrest or attach his goods in the hands of others, or debts due to him within the jurisdiction which are equivalent to his goods by way of security to enforce his appearance (*Mayor, etc., of London v. London Joint-Stock Bank*, 1881, 6 App. Cas. 393, 399, 403). It corresponds in its general character to the Scotch practice of arrest *fundandæ jurisdictionis causâ* (*Parnell v. Walter*, 1889, 16 Rettie, 917), and *saisie-arrêt* in French law. The debtor could surrender himself into custody instead of giving security. But this power as to detention after judgment was taken away by the DEBTORS ACT, 1869 (*In re Wilkins*, 1873, L. R. 8 Q. B. 107).

The custom has existed from time immemorial, and has been attributed to Roman or Continental sources. It is recognised by the charters of Edward IV., and continued in full exercise until the decisions in *Cox v. Mayor of London*, 1867, L. R. 2 H. L. 239, and *Mayor of London v. London Joint-Stock Bank*, 1881, 6 App. Cas. 393).

In the first of these cases it was declared necessary to give jurisdiction to the Court to show that the original debt, or the debt alleged to be due from the garnishee to the defendant, arose within the city, or that a party to the suit was a citizen or resided within the city; and the garnishee was held in such a case entitled to proceed by prohibition, and not bound to plead in the Mayor's Court to its jurisdiction. The decision put an end to a claim under colour of the custom to attach in the hands of any person who might be found in the city, money due from him to another until the other appeared as a litigant in the Mayor's Court. And the opinion of Willes, J., on behalf of the judges consulted by the House of Lords contains the whole history of the real and of the usurped custom.

In the second case it was decided (1) that the process against a garnishee under the custom of foreign attachment was personal, and could not be applied to a banking or other corporation; (2) that the customary procedure must be strictly followed to make a foreign attachment valid; and (3) that the custom did not permit any fictions or fictitious summonses, but required a real summons to the real defendant, and default by him before a foreign attachment could issue (see also *M'Daniel v. Hughes*, 1803, 3 East, 367). Since these decisions the procedure by foreign attachment has fallen into disuse (Glyn and Jackson, *Mayor's Court Practice*, 2nd ed., 8), since besides the difficulties of procedure, the attachment when obtained does not give the plaintiff the position of a secured creditor (*Levy v. Lovell*, 1880, 14 Ch. D. 334; *In re Sear*, 1881, 17 Ch. D. 74).

The garnishee in whose hands the debt is attached is discharged from the debt when the plaintiff has found security and obtained process of the Court, *i.e.* authority to its officer, to receive the debt or goods attached (6 App. Cas. 401).

The Mayor's Court has exclusive jurisdiction as to the foreign attachment unless the proceeding was removed to the High Court under sec. 18 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), and has equitable jurisdiction to grant discovery in aid of the proceeding (Glyn and Jackson, *Mayor's Court Practice*, 2nd ed., 7).

[*Authorities.*—Pulling, *Customs of London*, 10; Brandon on *Foreign Attachment*, 1861; Glyn and Jackson, *Mayor's Court Practice*, 2nd ed., 7, 260.]

Foreign Bill of Exchange.—See vol. ii. p. 95 (*ad fin.*), and p. 106 (*Conflict of Laws*).

Foreign Bonds.—Colonial bonds will not pass under a bequest of "foreign bonds" (*Hull v. Hill*, 1876, 4 Ch. D. 97). So, in conformity with the principle of *ejusdem generis* (see INTERPRETATION), a bequest of "foreign bonds and other securities" will pass foreign securities only, although the testator had investments in British funds (*Ferguson v. O'Gilbey*, 1842, 2 Dr. & War. 548). A foreign bond, although negotiable in the country under whose law it is issued, is not a negotiable instrument by the law of England, so as to give a *bond fide* holder for value a good title against the owner of the bond, from whom it had been stolen, in the absence of evidence of a custom of merchants in this country to treat it as negotiable (see *Picker v. London and County Banking Co.*, 1887, 18 Q. B. D. 515). See further, FOREIGN FUNDS; FOREIGN SECURITY.

Foreign Charities.—See vol. ii. pp. 469, 470. *Seem*, the authority of the CHARITY COMMISSION extends to charities which are founded and endowed abroad, if their revenues are applied in England or Wales (*In re Duncan*; *In re Taylor's Trusts*, 1867, L. R. 2 Ch. 356).

Foreign Company.—See vol. iii. pp. 206, 209; see also CORPORATIONS, FOREIGN; and consult *In re Colonial Mutual Life Assurance Society*, 1882, 21 Ch. D. 837 (the life assurance fund required by sec. 3 of the Life Assurance Companies Act, 1870, to have been accumulated prior to the return of the deposit, may consist of accumulations already existing abroad, and arising from the original business of the company); *Bulkeley v. Schutz*, 1871, L. R. 3 P. C. 764 (a foreign company cannot be registered as an existing company under the Companies Acts); *Lloyd Generale Italiano*, 1885, 29 Ch. D. 219 (a foreign company cannot, if it has no office in this country, have a winding-up order here); *Bateman v. Service* 1881, 6 App. Cas. 386 (*seem*, a limited company incorporated under the laws of another country may trade here without being incorporated according to English law); and add to the authorities cited in vol. iii. at p. 206; *In re General Company for Promotion of Land Credit*, 1870, L. R. 5 Ch. 363; 1871, L. R. 5 H. L. 176; *In re Federal Bank of Australia*, 1893, W. N. 46 and 77; and see Buckley on *The Companies Acts*, 7th ed., 246, 247, 466. As to service on foreign companies, see PARTIES. Certificates of shares in a foreign company on which a form of transfer and power of attorney has been indorsed and executed in blank, may be liable to probate duty if they are marketable in this country and are operative by delivery (*Stern v. R.*, [1896] 1 Q. B. 211).

Foreign Corporations.—See CORPORATIONS (FOREIGN).

Foreign Courts; Foreign Countries.—Various classes of questions affecting foreign courts and countries arise under English law. These are treated in this work under the heads of law to which they severally relate, *e.g.* injunctions to restrain proceedings in, under INJUNCTION and STAY OF PROCEEDINGS; the taking of evidence abroad for use here, under COMMISSION, EVIDENCE ON, vol. iii. at p. 125; the taking of evidence here for use abroad, *ibid.* at p. 126, etc.; the attendance of foreign witnesses, under WITNESS; the proof of foreign law, under

FOREIGN LAW, Proof of. See further, EXECUTION; JUDGMENT; JURISDICTION. An account of the method of taking evidence in England for the purposes of litigations in the Scotch Courts will be found in the article SCOTLAND.

Foreign Creditors; Foreign Debtors.—See ASSETS, vol. i. at p. 352; BANKRUPTCY, vol. i. at pp. 492, 516; and EXECUTORS AND ADMINISTRATORS.

Foreign Deserter.—See MERCHANT SHIPING.

Foreign Dividends.—As to assessment of to income tax, see 48 & 49 Vict. c. 51, s. 26, and article INCOME TAX.

Foreign Divorce.—The laws as to divorce in communities whose marriage laws are of Christian origin are of a most embarrassing variety. No two European States have the same reasons for granting a divorce; each of the United States and most British colonies and even the three parts of the United Kingdom have distinct divorce laws (see P. P. 1868, *a*). This variety, coupled with the migratory habits of modern times and a tendency to seek the most favourable forum for divorce, has made it often necessary to consider whether a divorce or decree of nullity of marriage obtained outside England can be treated as valid in England.

The question arises (1) in proceedings for BIGAMY, (2) in proceedings before the Matrimonial Courts, (3) on questions of inheritance or succession *ab intestato*. It arises only with reference to marriages of a monogamous or Christian character; polygamous marriages not being regarded as marriages at all (*In re Bethell*, 1888, 38 Ch. D. 220. But see *Mayne, Ind. Cr. Law*, 1896, p. 794). A case, *Skinner v. Skinner*, now stands for judgment in the Privy Council which turns on the effect of a Mohammedan divorce on a Christian marriage. (Judgment, Dec. 8, 1897. See MARRIAGE.)

The English Courts when a foreign divorce is set up consider it necessary to inquire whether it was granted under such circumstances as to render it valid in the view of private international law as understood in England: and the considerations to be weighed differ somewhat from those involved in dealing with ordinary FOREIGN JUDGMENTS.

Some foreign States treat marriage and divorce as matters of personal status, and as subject to the "personal statute," *i.e.* the national law of the husband, irrespective of the question of domicile.

The English Courts have fluctuated somewhat in the course of decision. The first view of jurisdiction in divorce was that an English marriage could not be dissolved by a foreign Court, nor except by a British statute (*M'Carthy v. De Caix*, 1831, 2 Russ. & My. 614). This was disposed of in *Shaw v. Gould*, 1868, L. R. 3 H. L. 85. But even now there seems to be no precedent in which an English Court has *actually* held a foreign divorce of British subjects to be valid. The next step was to admit the jurisdiction of foreign Courts in a country where English spouses were domiciled, but to attempt to limit the causes of divorce to those recognised by English law. This was disposed of in *Harvey v. Farnie*, 1883, 8 App. Cas. 43, and it is now settled that the grounds of divorce depend, in the view of English law, on the *lex domicilii*, and not on the national law of the spouses, nor the *lex loci contractus*. This

rule, no doubt, has the effect, so to speak, of changing the terms of the marriage contract according to the country in which the spouses are domiciled for the time being; but inasmuch as such domicile depends on the voluntary action of both, or of the husband as managing partner, no hardship is wrought except in those cases in which a husband leaves his wife and settles abroad and utilises the foreign procedure to get rid of her for refusing to join him.

The notion of a matrimonial domicile, as distinct from domicile by which succession is governed, or rather of a special domicile for purposes of divorce, is first distinctly expressed in the opinions of the majority of the Court in *Niboyet v. Niboyet*, 1878, 4 P. D. 1, which depend on a confusion between residence and domicile, and between the jurisdiction to grant a divorce *a vinculo*, or to annul a marriage, and that as to restitution of conjugal rights, alimony, or separation as to which temporary residence without domicile is at present held to give jurisdiction (*Le Mesurier v. Le Mesurier*, [1894] App. Cas. 517, at 531). The decisions at the different stages of development of the law were undoubtedly conflicting and perplexing, and produced much commentary from writers on private international law. The question appears now to have been set at rest in *Le Mesurier v. Le Mesurier*, [1895] App. Cas. 517, which is inconsistent with *Niboyet v. Niboyet*, and in which Lord Watson after a thorough examination of the principles applicable, and of the judicial decisions of England and Scotland, has laid down a rule which (while technically not binding English or Scotch Courts, having been given on an appeal from a colony subject to Roman-Dutch law) must be regarded as finally and conclusively settling the proper international rule to be applied by English Courts. And it is in accordance with *Shaw v. Gould*, 1868, L. R. 3 H. L. 85. That is to say, "No divorce is entitled to recognition in another State under the rules of international law, unless the Court which pronounced the decree of divorce had jurisdiction over the spouses by reason of the *bonâ fide* and permanent domicile of the spouses or the husband in the country to which the Court belonged" (see *Briggs v. Briggs*, 1880, 5 P. D. 153; *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139; *Sinclair's Divorce Bill*, [1897] App. Cas. 469).

The crucial question in considering the validity of a foreign divorce is, then, the domicile of the spouses when the suit was instituted. Their nationality is immaterial, as is the place where the marriage took place or where the cause of divorce arose, or the nature of the offence, provided that it is one which the *lex domicilii* recognises as ground of divorce. Thus an English marriage may be dissolved abroad, and for causes not recognised by English law (*Harvey v. Farnie*, 1882, 8 App. Cas. 47); or an Irish marriage, indissoluble there except by private Act, can be dissolved in England or the colonies if the spouses have settled there. But the domicile must have been really and in good faith acquired for all purposes, and not merely as a short cut out of a matrimonial *impasse*.

The proceedings in the foreign suit must not only be in a cause within its jurisdiction, but also in accordance with natural justice. Thus the respondent must have proper notice of the suit and opportunity of defence (*Shaw v. A.-G.*, 1870, L. R. 2 P. & D. 156; *Collis v. Hector*, 1875, L. R. 19 Eq. 175), and the decree must be final and have been pronounced on the merits without fraud or collusion (*Shaw v. Gould*, 1868, L. R. 3 H. L. 55; *Bonaparte v. Bonaparte*, [1892] Prob. 402).

Where jurisdiction is assumed under the municipal law contrary to the rules of international law, the divorce may be municipally valid in the country where it is granted, but ineffectual abroad, so that if either of the spouses remarries, he or she would, if a British subject, be indictable for

BIGAMY; and whether a British subject or not, if the true domicile of the spouses was in England, a petition for divorce could be filed there for bigamy and adultery (*Green v. Green*, [1893] Prob. 80). Serious difficulties may arise where the law of a British possession provides for the grant of divorce irrespective of domicile, as in India (see *Thornton v. Thornton*, 1886, 11 P. D. 176; *Warter v. Warter*, 1890, 15 P. D. 152). The proper conclusion, having regard to *Le Mesurier's* case, seems to be that such a divorce would have its full effect only in India and be of no effect in other parts of the empire, and certainly of no effect in foreign States.

In some States the only tribunal for matrimonial questions is ecclesiastical, and in certain Roman Catholic countries and in Roman Catholic communities in Turkey there is no civil tribunal competent to pronounce a decree of divorce, but if by papal rescript or decree of a proper ecclesiastical officer, a divorce *a vinculo* were pronounced as to persons domiciled in the particular country, it would apparently be recognised in England (*Parapano v. Happaz*, [1894] App. Cas. 65; *Connolly v. Connolly*, 1851, 7 Moo. P. C. C. 438).

When once the international validity of a foreign divorce is established it is treated in England as having the same effect on the status, contracts, and property of the parties as it would have under the *lex domicilii*.

This will make them free to remarry, and if the marriage takes place outside the territory where the divorce was pronounced, free from any penal disabilities imposed by the *lex fori* on remarriage of a guilty party (*Scott v. A.-G.*, 1886, 11 P. D. 126). But where remarriage takes place before the *vinculum* is fully severed it is invalid (*Warter v. Warter*, 1890, 15 P. D. 152).

A decree of divorce, though in substance a judgment on *status*, has the effect of a judgment *in rem*, i.e. it is treated as conclusive in suits other than those between husband and wife (Foote, *Priv. Int. Law*, 2nd ed., 577).

The position of a foreign decree of nullity seems to be in substance the same as that of a foreign decree of divorce. But there may be grounds of distinction, e.g. where a marriage between foreigners in England, there lawful, is annulled in the country of their nationality or domicile, on the ground that by that law the necessary formalities and consents were not complied with and given (*Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67). But a foreign decree of nullity for impotence by the Courts of the husband's domicile has been treated as valid (*Turner v. Thompson*, 1888, 13 P. D. 37).

Antenuptial contracts or marriage settlements are not invalidated by the divorce or affected by the *lex fori domicilii* (*Watts v. Shrimpton*, 1855, 21 Beav. 97). But each spouse is put into the position of an unmarried person in respect to free personalty, under the *lex domicilii*. As to real property, subject to any special rule of the *lex loci*, persons divorced by a valid foreign judgment, and their children by a subsequent marriage valid by the law of England, would be entitled to inherit or succeed *ab intestato*, just as much as if the divorce had taken place in England (*Shaw v. Gould*, 1868, L R. 3 H. L. 55).

With reference to foreign decrees for jactitation of marriage and restitution of conjugal rights, it has not been authoritatively settled what course English Courts would take (*Le Mesurier v. Le Mesurier*, [1895] App. Cas. at 526). But they appear to exercise jurisdiction in these cases, and as to judicial separation or alimony without much regard to the question of domicile (*In re Tucker*, [1897] Prob. 83).

[*Authorities*.—Dicey on *Conflict of Laws*, 273, 387, 430, 753; Westlake,

International Law, 3rd ed., p. 74; Foote, *Private International Law*, 2nd ed., p. 85; Geary on *Marriage*, pp. 525-530; and most full and valuable articles by Mr. Monnier in *Law Magazine*, vols. 286 (1892), p. 12, and 287 (1893), p. 115.]

Foreign Domicile.—See DOMICILE.

Foreign Enlistment.—As a general principle it is the duty of neutral States to abstain from any acts which may promote the success of one belligerent against the other. But can a State be held liable for the acts of private individuals, and to what extent is it bound to force them to respect this principle? In certain cases the belligerent is allowed by the law of nations to deal with the individual neutral infringer directly (see BLOCKADE; CONTRABAND OF WAR; VISIT AND SEARCH). The subject of the liability of a State for acts of its citizens has given rise to controversy chiefly in connection with the United States. In 1855 President Pierce stated that "the laws of the United States do not forbid their citizens to sell to either of the belligerent Powers articles of contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve a breach of national neutrality, nor of themselves implicate the Government" (Message to 34th Congress, 1st Session).

That, however, which on a small scale may escape the control of a Government may on a large one become notorious or come otherwise within official cognisance. Whether the United States Government was logical in the position it took up subsequently in the *Alabama* case, we can leave to controversialists. Suffice it to say that in the Treaty of Washington it admitted that the limit of the obligation of a State for the acts of citizens is that it shall use, as therein expressed, "due diligence" (see ALABAMA CASE). There may be different opinions as to what amounts to "due diligence," but it would be unreasonable to expect any country to do more than enforce by the criminal methods and procedure it possesses a law for the prevention of acts of infringement of neutrality committed on its own soil.

The first Foreign Enlistment Act adopted for the purpose of preventing British subjects from taking part in wars between States at peace with Great Britain was that of 1819 (59 Geo. III. c. 69). This Act inflicted fines or imprisonment or either on any British subject who enlisted or procured others to enlist in the naval or military service of a foreign country and forbade under similar penalties the fitting out of armed vessels without licence of the Crown for employment against a friendly State. If these provisions had been strictly enforced they might possibly, one would think, have sufficed to prevent the departure of the *Alabama* from Liverpool. They were not, however, considered sufficient, and a Commission was appointed "to consider the character, working, and effect of the laws available for the enforcement of British neutrality, and to inquire and report whether any and what changes ought to be made in such laws for the purpose of giving them increased efficiency and bringing them into full conformity with British international obligations." The report of the Commission, published in 1867, led three years later to the repeal of the Act of 1819 and the adoption of the Act now in force (33 & 34 Vict. c. 90).

This Act, the preamble of which recites that its object is "to make pro-

vision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace," deals with two classes of offences, viz. illegal enlistment and illegal ship-building and expeditions. Secs. 4 to 11 contain the list of prohibited acts, viz.—Enlisting or inducing any person to enlist in the military or naval service of a foreign State at war with a friendly State; leaving British dominions (or inducing, etc.) with intent to serve such foreign State; embarking persons under false representations in order that they may be led to enter into such service; the taking or engaging to take on board by the master or owner of a ship, persons illegally enlisted; building, causing to be built, equipping, or despatching a ship, knowing or having reasonable cause to believe that the ship is to be employed in the service of such foreign State (the *onus probandi* lying upon the builder of his own ignorance); augmenting the warlike force of a ship serving such foreign State; and fitting out a naval or military expedition against a friendly State. Permission to do any of the above-mentioned acts can only be obtained by a direct Royal licence, signed with the Royal sign-manual, or by an Order in Council, or by Royal Proclamation (s. 15).

Offences against the Act are punishable by fine and imprisonment, or either, and imprisonment, if awarded, may be either with or without hard labour. Sec. 13 limits terms of imprisonment to two years.

The offence of building, equipping, etc., ships for use by a belligerent towards whom Her Majesty is neutral is punishable, in addition to the above-mentioned penalties, by forfeiture to the Crown of ship or equipments (s. 8); provisions are also made for the detention of ships engaged in illegal enlistment and transport (s. 7); but all proceedings for the condemnation and forfeiture of a ship or equipment must have the direct sanction of the Secretary of State (s. 19).

Customs officers, either home or colonial, officers of the Board of Trade, commissioned officers on full pay in the naval or military service of the Crown, and Admiralty officials by order of the Board are authorised to seize and detain any ship built or equipped in contravention of the Act, or used for the illegal transport of British subjects for the purposes of foreign enlistment (s. 21); and these officers may call to their aid in enforcing such seizure, any constable or officer of police, any naval or military or marine officer, any excise officer or officer of customs, any harbour-master or dock-master, and any officer having legal authority to make legal seizures of ships, and, if necessary, force may be used to make such seizures (s. 22).

Sec. 23, which is designed to prevent a repetition of the errors which enabled the *Alabama* to sail unmolested from an English port, begins as follows :—

If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship and to detain the same until it has been either condemned or released by process of law, or in manner hereinafter mentioned. The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the Court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown. If the applicant establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, the ship shall be released and restored. If the applicant fail to establish to the satisfaction of the Court that the ship was not

and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

Provisions then follow for releasing any ship where no proceedings are pending for its condemnation, or on the owner giving satisfactory security that the ship shall not be employed contrary to the Act. By sec. 24 if the local authority becomes aware that a ship is being built, equipped, etc., the certain or probable destination of which is one in contravention of the Act, it becomes his duty to detain such ship and to communicate at once with the Secretary of State. Warrants may be issued by the Secretary of State or chief executive authority (s. 25), empowering any person to enter a dockyard and inquire as to the destination of any ship which may appear to him to be one likely to contravene the provisions of the Act, and to search such ship.

The number of cases under the Act has been small. The two most important related to alleged breaches of neutrality in connection with the Franco-German war. An English tug, *The Gauntlet*, undertook at the ordinary rates to tow a French prize ship with prize crew on board, captured from the Prussians, from the Downs within British waters to Dunkirk Roads. This was done, and upon the contention that the act was a breach of neutrality under sec. 8 of the Act, it was held in first instance, *i.e.* by the Court of Admiralty, that no illegal act had been committed, the tug not having been employed in the military or naval service of France, but the decision was reversed on appeal to the Judicial Committee on the ground that expediting the arrival of the crew and the ship to a French destination was a despatching of the ship within the meaning of sec. 8 of the Act; the tug was therefore forfeited to the Crown (*Dyke v. Elliott*, 1871, L.R. 3 Ad. & Ec. 381). The second important case arose out of a contract made by an English firm with the French Government to lay a submarine cable along certain parts of the French coast. It was held that though the line when completed would doubtless be used partly for military purposes, the contract was of a purely commercial character, and its performance was not rendering military or naval service within the meaning of the Act (*The International*, 1871, L. R. 3 Ad. & Ec. 321). It seems to follow from this decision that if the main object had been to subserve the military operations of the belligerent, the case would have come within its meaning. As to the *Sandoval* and *Jameson* cases, see NEUTRALITY and RAID.

Foreign Funds.—As to the meaning of “foreign funds”—a term which has come under judicial consideration chiefly in connection with trusts for investment and questions of conversion—see *Ellis v. Eden*, 1857, 26 L. J. Ch. 533; *In re Langdale*, 1870, L. R. 10 Eq. 39; and *Cadell v. Eagle*, 1877, 5 Ch. D. 710.

Foreign-going Ship.—This expression in the Merchant Shipping Act includes every ship employed in trading or going between some place or places in the United Kingdom and some place or places situate beyond the following limits—*i.e.* the Coasts of the United Kingdom, Channel Islands, Isle of Man, and the Continent of Europe between the river Elbe and Brest inclusive (s. 742). Ships engaged in the whale, seal, walrus, or Newfoundland cod fisheries are foreign-going ships and not fishing-boats, except ships engaged in the Newfoundland cod fisheries which

belong to ports in Canada and Newfoundland (s. 744). Every foreign-going ship (not an emigrant ship) carrying a hundred persons on board must have a duly-qualified medical practitioner under a penalty to the owner of £100 (s. 209). The official log of a foreign-going ship must be delivered to the superintendent before whom the crew is discharged within forty-eight hours after the ship's arrival at her first port of destination in the United Kingdom or the discharge of her cargo, whichever comes first (s. 242 (1)). For other provisions applying to foreign-going ships, see CREW; SEAMEN.

Foreign Government.—A foreign Government is a Government not under the jurisdiction of this country. A subordinate Government, *e.g.* one of the American States, satisfies the definition (*Caulett v. Earle*, 1877, 5 Ch. D. 710).

Foreign Indorsement.—See NEGOTIABLE INSTRUMENT.

Foreign Judgments.—The theories of Continental jurists with respect to the force to be accorded in a civilised State to a judgment rendered by a competent Court of another civilised State have not yet been completely harmonised nor adopted as fixed rules of international law; and in practice each State has its own view of international law (*In re Queensland Mercantile Agency Co.*, [1891] 1 Ch. 536) and its rules as to the extent to which and the mode in which it will give effect to foreign judgments; but all agree in one thing that the foreign judgment cannot be executed *proprio vigore* or by the officers of the country in which it was given (Phillimore, *International Law*, 2nd ed., vol. iv. p. 727). There are treaties between many States by which they agree, subject to certain formalities, to execute within their own territories the judgments of each other's Courts. But no such treaty has been made by the United Kingdom, nor, with exceptions to be presently stated, does any statute exist to regulate procedure for enforcing in England the judgment of a Court outside England.

The mode of dealing in England with foreign judgments rests, therefore, wholly upon judicial decision, influenced no doubt by study of jurists and text-writers, and bearing traces of that influence in the variations of judicial opinion and the tendency to adopt the views, now of one, now of another school of theorists in comity or international law. It is not proposed to discuss those theories here in detail, but merely to indicate the result of the judicial decisions and the procedure consecrated by practice for dealing with claims on foreign judgments. It must be premised (1) that the questions involved are distinct to some extent from what is called the CONFLICT OF LAWS (*q.v.*) which frequently arises as to ~~the~~ law applicable to a particular transaction; (2) that the English Courts will assert jurisdiction at the invitation of any person with greater readiness than foreign Courts (*see* R. S. C. 1883, Order 11), and will absolutely decline it only in a few cases, *e.g.*—

- (a) Claims as to title to land abroad;
- (b) Questions of status raised by persons not domiciled in England in cases where English property is not affected;
- (c) Claims to enforce foreign criminal, penal, or revenue laws.

The establishment of jurisdiction by fiction in transitory actions and the abolition of venues have led to this result by a process traced in

Companhia de Moçambique v. British South Africa Co., [1893] App. Cas. 602. But the procedure by which a discretionary jurisdiction is exercised under R. S. C. 1883, Order 11, while it illustrates current views of the comity of nations, forms a code for the High Court and binds British subjects abroad (*In re Busfield*, 1886, 32 Ch. D. 350; *In re Cliften*, [1895] 2 Ch. 21), has no direct bearing on the treatment of foreign judgments in England.

Two theories have been formulated by English lawyers to justify the intervention of English Courts to enforce foreign judgments. The first is that of the comity of nations (*Alves v. Banbury*, 1814, 4 Camp. 28; *Castrique v. Imrie*, 1861, 30 L. J. C. P. 177; *Messina v. Petrocchino*, 1872, L. R. 4 P. C. 144). The second is that developed in *Godard v. Gray*, 1870, L. R. 6 Q. B. 139; *Schibsy v. Westenholz*, 1870, L. R. 6 Q. B. 155; and *Abouloff v. Oppenheimer*, 1883, 10 Q. B. D. 295, viz. that the judgment of a competent foreign Court that a sum is due creates a legal obligation to pay it upon which an action may be brought to enforce the judgment. The theories are perfectly consistent; the first indicates the propriety of the recognition of foreign judgments, the second the particular fiction or adaptation of English procedure for effecting it. But the second view needs qualification. It is well settled that the effect of a foreign judgment *in personam* in favour of a plaintiff in English law is not to merge the debt in the judgment nor to create *res judicata* (*Hall v. Odber*, 1809, 11 East, 118; 10 R. R. 443; *Bank of Australasia v. Harding*, 1850, 9 C. B. 661; *Same v. Nias*, 1851, 16 Q. B. at p. 738; *Kilsall v. Marshall*, 1856, 1 C. B. N. S. at p. 259). It merely creates—

(1) A presumption that the foreign Court was competent and proceeded regularly, and in accordance with its own law and natural justice (*Sinclair v. Fraser*, 1771, 20 St. Tri. 468 (H. L. Sc.); *Houlditch v. Marquis of Donegal*, 1834, 8 Bli. N. S. 301, where all authorities to that date are fully noted; *Henderson v. Henderson*, 1844, 6 Q. B. 298).

(2) An indisposition when these presumptions are not rebutted to review the correctness of the foreign judgment by the *lex fori* (*Castrique v. Imrie*, 1870, L. R. 4 H. L. 414; *Vadala v. Lawes*, 1890, 25 Q. B. D. 306).

Foreign judgments for purposes of English law include—

(1) Judgments of Courts of any British possession outside the United Kingdom, including those of the Channel Islands and Isle of Man, and of Courts created under the Foreign Jurisdiction Acts and Orders in Council:

(2) Judgments of the Courts of independent foreign civilised States:

(3) Judgments of the Scotch and Irish Courts.

Classes (1) and (2) are treated in the English Courts in the same way.

Scotch and Irish judgments for debt, damages, and costs may be registered in England and enforced without bringing an action, by virtue of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and the rules made thereunder in 1868 (St. R. & O., Revised, vol. vii. p. 363).

The Act specially excludes Scotch decrees *in absentia*, where the Scotch Court has arrested funds to found jurisdiction (s. 8) (*In re Low*, [1894] 1 Ch. 147, 158). It did not apply to equity judgments or judgments and decrees *ad facta præstanda*, or of the nature of prohibitions or injunctions, or for the recovery of land, or on questions of status (*Wotherspoon v. Connolly*, 1871, 9 Macph. 510, 513; *Phosphate Sewage Co. v. Molleson*, 1 App. Cas. 780; 4 do. 801; *In re Orr-Ewing*, 1884, 11 Rettie, 600, 630). But possibly sec. 76 of the Judicature Act, 1873, may be read as extending the Act of 1868 to all actions in the High Court (see *Fontaine's case*, 1889, 41 Ch. D. 118, 122).

The effect of the registration is to make the judgment that of the Court in which it is registered (*In re Low*, [1894] 1 Ch. 147) for purposes of execution, which do not exclude procedure by judgment summons (*In re Watson*, [1892] 1 Q. B. 21). One result of the statute is that a judgment in Scotland on a claim statute-barred in England can be registered and enforced in England (*In re Low*, [1894] 1 Ch. 147).

The Act also puts an end to the rule requiring security for costs from the Scotch or Irish petitioner in the case of judgments to which it applies (§ 5, and *Raeburn v. Andrews*, 1874, L. R. 9 Q. B. D. 118). But it did not apply to the excepted proceedings, *supra* (*In re East Llangynog Head Mining Co.*, 1875, 23 W. R. 587). The Judicature Act, 1873, s. 76, appears to extend the exemption from security for costs to all Scotch and Irish judgments proceeded on in England, but not to orders made on a claim in a winding-up of a company (*Fontaine's case*, 1889, 41 Ch. D. 118, 122).

The Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), has similar rules with respect to English, Scotch, and Irish Courts of inferior civil jurisdiction.

The scheme of both Acts is to render the foreign judgment "executory," as it is termed by Continental jurists, without going through the procedure ordinarily necessary under English law.

Orders made on a winding-up under the Companies Acts made in Scotland or Ireland are enforceable in England under secs. 122-125 of the Companies Act, 1862 (25 & 26 Vict. c. 89). See Buckley on *Companies*, 7th ed., pp. 336-343.

The Bankruptcy Act, 1883, makes provision for enforcing English orders in Scotland and Ireland, and a correlative provision as to enforcing Scotch or Irish bankruptcy orders in England, on request from the Scotch or Irish Courts (see 46 & 47 Vict. c. 53, ss. 117, 118). As to judgments affecting matrimonial relations, see FOREIGN DIVORCE; FOREIGN MARRIAGE.

Foreign judgments are further classified with reference to their claim to recognition in England according as they were rendered (1) in actions *in personam* on the parties; (2) in actions *in rem*; (3) in questions affecting administration of the property of deceased persons, or bankruptcy or liquidation, admiralty matters, or questions of lunacy or status.

1. *Actions in personam*.—It seems to be immaterial whether the action arose *ex contractu* or *ex delicto* (*Smith v. Nicholls*, 1839, 5 Bing. N. C. 208). A foreign judgment in favour of a defendant has in England the effect of *res judicata* and absolutely bars any proceeding in England for the same cause of action (*Philips v. Hunter*, 1795, 2 Black. H. 402; *Ricardo v. Garcias*, 1845, 12 Cl. & Fin. 368), provided that the foreign Court was competent to entertain the suit in which the judgment was given, and apparently subject to a right to sue in England for relief other than that refused abroad (*Callandar v. Dittrich*, 1842, 4 M. & G. 68).

Where the foreign plaintiff in an action *in personam* wishes to enforce his judgment in England, the present procedure is either to sue on the original cause of action (*Smith v. Nicholls*, 1839, 5 Bing. N. C. 208), or, which is the more usual course, to issue a writ out of the High Court specially indorsed under R. S. C., Orders 3 and 6 (*Hodson v. Baxter*, 1858, 28 L. J. Q. B. 61; *Grant v. Easton*, 1883, 13 Q. B. D. 302), and to apply under Order 14 for summary judgment upon an affidavit verifying a certified and, if necessary, translated copy of the foreign judgment (14 & 15 Vict. c. 99, s. 7). The defendant is not permitted to defend the action unless he can show that there is a question to be tried—

(a) As to whether the foreign judgment was obtained by fraud, *i.e.* that the

foreign Court was deceived (*Cammell v. Sewell*, 1858, 27 L. J. Ex. 448; *Vadala v. Lawes*, 1890, 25 Q. B. D. 306), or deliberately went wrong either on the facts, the law, or the procedure (*Castrique v. Imrie*, L. R. 4 H. L. 414). Involuntary mistake by the foreign Court is no answer to the action. But there are decisions authorising disregard of the foreign judgment for errors on the face of it (*Robertson v. Struth*, 1844, 5 Q. B. 941; *Reimers v. Druce*, 1857, 26 L. J. Ch. 196), or for mistakes as to English law (*Castrique v. Imrie*, *supra*).

(b) Whether the foreign Court has jurisdiction over the parties and the subject-matter of the suit, and proceeded according to natural justice.

(c) Whether the suit is in respect of a matter in which in the English view of international law the remedies are territorial only and cannot be properly enforced in England.

The latest and most authoritative English opinion on the essential elements in international law for the validity of a foreign judgment is that expressed by the late Earl of Selborne in *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] App. Cas. 670. The appellant, a subject of Jhind and there domiciled, was treasurer to the respondent, an independent ruler of an Indian State. He left his service and the State. The Rajah sued him in the State Courts for money alleged to be due from him as treasurer. He was served in Jhind with the process, but did not appear. Judgment *ex parte* was entered against him, and an action brought thereon in a British Indian Court. These facts exactly raised the question of the jurisdiction of the Faridkote Court over the appellant, the cause of action whether in contract or *ex delicto* having clearly arisen in that State. Lord Selborne's opinion sums up very tersely the rules applicable:

"There was nothing to take this case out of the general rule that the petitioner must sue in the Court to which the defendant is subject at the time of suit (*actor sequitur forum rei*), which is rightly stated by Sir Robert Phillimore (*Inter. Law*, vol. iv. s. 891) 'to lie at the root of all international and most domestic jurisprudence on the matter.' All jurisdiction is properly territorial and *extra territorium jus dicenti impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and in questions of status or succession governed by domicile it may exist as to persons domiciled or who when living were domiciled within the territory as between different provinces under one sovereignty (*e.g.* under the Roman Empire the legislation of the sovereign may distribute and regulate jurisdiction); but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners who owe no allegiance or obedience to the power which so legislates.

"In a personal action (whether of contract or *ex delicto*), to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except when authorised by special local legislation in the country of the *forum* in which it was pronounced. These are doctrines laid down by all the leading authorities on international law . . . and no exception is made to them in favour of the exercise of

jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose or in cases of contract by the Courts of the *locus solutionis*. In these cases, as well as all others where the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice." By personal actions in this passage is meant actions *in personam* and *inter partes*, as distinguished from actions *in rem*, probate actions, and proceedings in probate or administration, and bankruptcy (Dicey, *Conflict of Laws*, 233). The principles apply to colonial as well as foreign judgments (see *Turnbull v. Walker*, 1892, 67 L. T. 67).

A foreign judgment will therefore be of no validity in England where jurisdiction has been assumed over an absent foreigner in respect of a contract made by him while resident in the country of the *forum*, and to be performed there; and the decision to the contrary in *Becquet v. Macarthy*, 1831, 2 Barn. & Adol. 951, must be treated as overruled in *Don v. Lipmann*, 1837, 5 Cl. & Fin. 1; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 1, and the *Faridkote* case.

A jurisdiction created by seizure of the land or goods of the defendant in the country of the *forum* in his absence would not be recognised as internationally valid (*De Cosse Brissac v. Rathbone*, 1861, 6 H. & N. 301; *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155. But see *In re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713).

In the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54, s. 7), Scotch decrees *in absentia* founded on arrest *ad fundandam jurisdictionem* are specially exempt from the benefits of the Act.

Where a defendant, over whom the foreign Court would have had no jurisdiction *in absentia*, appears and submits to the jurisdiction, the foreign judgment will be presumed to bind him (*Novelli v. Rossi*, 1831, 2 Barn. & Adol. 757; *De Cosse Brissac v. Rathbone*, 1861, 6 H. & N. 301), unless the foreign Court was, from an international point of view, absolutely incompetent (*Oulton v. Radcliffe*, 1874, L. R. 9 C. P. 189).

Where a man not domiciled nor resident in, nor a subject of a foreign State is served with process of its Courts while passing through it, and defends the action, the judgment can be enforced in England (*Carrick v. Hancock*, 1895, 12 T. L. R. 59). To refuse to do so would be inconsistent with English practice, which recognises to the fullest the power to serve a writ on a foreigner only casually present in England, and to proceed against him validly.

It seems, however, to be possible for the parties to a contract by express stipulation to accept the *forum loci contractus* as having by reason of the contract a conventional jurisdiction against the parties to the contract for all future time, irrespective of their domicile or residence (*Faridkote* case, [1894] App. Cas. p. 686). Such a stipulation would be treated as submitting to the jurisdiction, not merely as to the construction of the contract which would for most purposes be determined by the *lex loci contractus* (*Hamlyn v. Talisker Distillery Co.*, [1894] App. Cas. 202, 213); but there is no authority for implying such a stipulation (*Faridkote* case, at p. 685, explaining *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 161). ..

It is now common practice to elect domicile in the country of the *locus contractus* or *solutionis*, or to stipulate that the contract shall be construed by the law, or adjudicated on by the Courts of a particular country (*Vallée v. Dumergue*, 1849, 4 Ex. Rep. 290). This rule appears to extend to judgments against shareholders resident in England, in companies domiciled in the

foreign State (*Leishman v. Cochrane*, 1867, 12 W. R. 181; *Copin v. Adamson*, 1875, 1 Ex. D. 17).

The English Courts will not recognise or give effect to a foreign judgment which enforces the penal laws of the foreign State (*Ogden v. Folliot*, 1789, 1 Black. H. 123; 1790, 3 T. R. 726; 2 R. R. 736), and will decide for themselves whether the law is or is not penal, regardless of the views of the foreign Courts (*Huntington v. Attrill*, [1893] App. Cas. 151). This rule applies to conviction for crime (but see EXTRADITION), to attainders, confiscations, penalties imposed, and to these rules of States which involve slavery or religious disabilities.

Nor will they enforce the revenue laws of another State, either by action on a foreign judgment, or by direct action (*Planché v. Fletcher*, 1779, 1 Doug. 251). Conversely in the Finance Act, 1894, it is recognised that proceedings for duties under the Act cannot be taken in a British colony. It is uncertain how far documents which for validity require a stamp under the foreign law, can be received unstamped as evidence in England (*Clegg v. Levy*, 1812, 3 Camp. 167; *Leroux v. Brown*, 1852, 12 C. B. 801, 808 note).

The decree of a foreign Court with reference to landed property not situate within the territory of the State for which the Court is appointed or acting, will not be recognised in the State where the land lies, nor indeed anywhere. Such a decree violates the first principles of private international law. So far as concerns the title to landed property, or questions involving inquiry into such title, English law recognises that its Courts have no jurisdiction (*Norton v. Florence Land Co.*, 1877, 7 Ch. D. 332; *Pitts v. La Fontaine*, 1880, 5 App. Cas. 564; *Companhia de Moçambique v. British South Africa Co.*, [1893] App. Cas. 602).

Courts of equity have in certain cases acted *in personam* with reference to questions involving rights to land abroad (*Penn v. Lord Baltimore*, 1750, Wh. & T. L. C., 7th ed. 755), as they have with reference to the estates of persons not domiciled in England, and whose property was not there situate (*Orr-Ewing v. Orr-Ewing*, 1885, 9 App. Cas. 34; *Orr-Ewing v. Orr-Ewing*, 1886, 10 App. Cas. 453). The international validity of these performances is more than doubtful. It met with severe and justifiable criticism in the Scotch Courts, 1884, 11 Rettie, 600; and the practice of the Chancery Division as to administrative action was modified in consequence of the litigation (see Dicey, *Conflict of Laws*, 216).

Foreign judgments or claims in respect of a tort (delict) committed abroad will be enforced by the English Courts if the tort in substance is common to the laws of both States (*The Halley*, 1868, L. R. 2 P. C. 193; *Scott v. Lord Seymour*, 1862, 31 L. J. Ex. 457; 32 L. J. Ex. 61; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1; *Machado v. Fontes*, [1897] 2 Q. B. 231).

The question of the remedy for the wrong in the country where it is committed is treated in England as part of the *lex fori*, and as immaterial so far as a civil proceeding in England is concerned; but all defences available abroad would be available here, and apparently also those of the *lex fori*.

It is not clear whether foreign judgments in actions *ex contractu* will be enforced in England if the contract is illegal or immoral in English law. *Santos v. Ilidge*, 1860, 8 C. B. N. S. 861, appears to be an authority in favour of enforcement; but in particular cases the disposition to enforce such contracts might be stayed by specific provisions of municipal law.

The foreign judgment must be a final judgment (*Nouvion v. Freeman*, 1890, 15 App. Cas. 1), and where it is by default territorial jurisdiction must be shown.

Administration.—A grant of administration by a foreign Court cannot lawfully be acted upon to collect assets of the deceased in England, nor does the foreign representative acquire any *locus standi* in England until he obtains letters of administration from the High Court (see *A.-G. v. New York Breweries*, [1897] 1 Q. B. 738, under appeal; *W. N.* 1897, 175).

Where the deceased was domiciled abroad, the English Courts will usually, but not as of right, grant administration to his personal representative, heir, or successor under the law of his domicile (*Enoch v. Wyllie*, 1862, 10 H. L. 1; *In bonis Suarez*, [1897] Prob. 82; *In bonis Briesmann*, [1894] Prob. 260; *In bonis Earl*, 1866, L. R. 1 P. & D. 450), or under 24 & 25 Vict. c. 121 to the consul of the State of which the deceased was subject.

Scotch confirmations and Irish grants have the same effect as English grants on production of the grant, etc., and deposition of a sealed copy in the Probate Registry (20 & 21 Vict. c. 79, s. 95; 21 & 22 Vict. c. 56, s. 12; and see DEATH DUTIES); and colonial grants have the same effect on following a similar procedure under the Colonial Probates Act, 1892, and payment of the proper duty. See DEATH DUTIES, vol. iv. p. 120.

Admiralty.—Courts of Admiralty, as Courts of the civil law, seem from the earliest time to have shown a disposition to enforce foreign judgments of like Courts on letters of request.

The judgments with which they were mostly concerned being *in rem*, occasion rarely arose for their enforcement by a plaintiff; but they have always been treated as conclusive where the adjudicating Court had jurisdiction over the *res* (*City of Mecca*, 1870, 5 P. D. 28; *Minna Craig, S. S. Co. v. Chartered Mercantile Bank*, [1897] 1 Q. B. 460; *Mannheim*, [1897] Prob. 13).

But persons who have had the benefit abroad of execution under a foreign judgment *in rem* must in English proceedings for further indemnity give credit for the amount recovered abroad (*The Crathie*, [1897] Prob. 178).

As to the decisions of foreign prize Courts, see PRIZE.

Actions *in personam* in foreign colonial admiralty Courts are treated by English Courts in the same way as actions *in personam* in any other Court; nor does the fact that appeal lies to the Privy Council from colonial vice-admiralty Courts in any way affect the matter.

Bankruptcy.—An adjudication in bankruptcy in Scotland or Ireland operates as a transfer to his representative of all the bankrupt's realty and personalty within the British Empire (*Callender Sykes & Co. v. Colonial Secretary*, [1891] App. Cas. 460). Its effect in foreign States is here immaterial (Dicey, *Conflict of Laws*, 442).

An adjudication in a British possession or a foreign State does not operate as a transfer to his syndic of his realty and chattels real in England; but does operate the transfer of his personalty (*meubles*) in England, so far as the foreign law purports to effect such transfer (*In re Davidson*, 1866, L. R. 2 Eq. 23; *In re Hayward*, [1897] 1 Ch. 905). It is not clear whether this should be limited by restricting it to cases where the debtor is domiciled where he is adjudicated. But the English Act does not recognise the need of "domicile" for jurisdiction in such cases (*In re Nordenfelt*, [1895] 1 Q. B. 151); it appears to be more strict as to foreign jurisdiction (*In re Artola*, 1890, 24 Q. B. D. 640; Dicey, *Conflict of Laws*, 443, 444).

The existence of a foreign adjudication is no bar to adjudication in England in respect of acts of bankruptcy committed there, even if the prior foreign bankruptcy is in the country of the debtor's domicile (*In re Artola*, 1890, 24 Q. B. D. 640; Williams, *Bankruptcy*, 6th ed., 301; Robson, *Bankruptcy*, 7th ed., 383, 487, 525).

But the Court will admit the claims of foreign creditors subject to bringing into the common fund any dividends received under a foreign bankruptcy (*Banco de Portugal v. Waddell*, 1880, 5 App. Cas. 161). A Scotch or Irish discharge is effectual in England; and a discharge in a foreign or colonial bankruptcy which extinguishes the liability and does not merely bar the remedy, is a bar in England except to claims for debts on contracts made and to be performed in England. This rule is irrespective of the debtor's domicile at the date of discharge (*Bartley v. Hodges*, 1861, 30 L. J. Q. B. 352; *Weir v. M'Henry*, 1891, L. R. 6 C. P. 228; *Gibbs v. Société des Métaux*, 1890, 28 Q. B. D. 399; Williams, *Bankruptcy*, 6th ed., 98; Dicey, *Conflict of Laws*, 448-456). *Per contra*, an English order of discharge is a bar to all prior debts, wherever contracted, all being proveable here (*Armani v. Castrigue*, 1844, 13 Mee. & W. 443).

Companies.—Subject to the specific provision of the Companies Acts, English Courts deal with foreign judgments against companies domiciled in England as foreign judgments *in personam*, and with foreign judgments against insolvent companies as with the like against bankrupts. Difficulties arise at times with respect to special rules of Scotch law and procedure affecting companies (*In re Queensland Mercantile and Agency Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. 219; *In re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713), or as to the priority of English creditors over the liquidator under a foreign decree (*Levasseur v. Mason & Barry Ltd.*, [1891] 2 Q. B. 73). And the Judicial Committee are considering their report on *New Zealand Loan and Mercantile Agency v. Morrison* (23rd November 1897), on the question whether a scheme of liquidation under the English Companies Acts is binding on creditors in Victoria, and in *Spiller v. Turner*, [1897] 1 Ch. 911, a question arose as to the incidence of a colonial Act on English shareholders in a British company.

Lunacy.—Adjudications by any Court outside England, except an Irish Court, that a person outside England is a lunatic are not conclusive in England (*In re Houston*, 1826, 1 Russ. Ch. 312), and if the lunatic reaches England, a fresh proceeding to establish his mental condition will be necessary (53 & 54 Vict. c. 5, s. 90 (2)). But the English Courts on letters of request from the foreign Court will assist them so far as their decrees are compatible with our municipal law (*In re Sottomaior*, 1874, L. R. 9 Ch. 677). Under sec. 134 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), the English Court can transfer the funds in England of a lunatic resident abroad, and found lunatic by a colonial or foreign Court, to the person in whom the management of the lunatic's estate is vested by the foreign Court, without requiring the curator to get the property vested in him according to English law (*In re Brown*, [1895] 2 Ch. 666; *In re Linden*, [1897] 1 Ch. 453), in which decisions all the previous cases are reviewed and discussed. Even where the lunatic abroad is not so found judicially, the English Courts appear to have a discretion to order transfer of funds (*In re Barlow*, 1887, 36 Ch. D. 287; and see also Dicey, *Conflict of Laws*, 507-509; Wood Renton on *Lunacy*, 273).

Status.—Questions of civil status, with its attendant rights and disabilities, in the view of English Courts (other than those of a penal character), rest upon domicile and not upon nationality (*Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431). But English Courts will not recognise incapacity of a person to sue in English Courts because he had been declared a bankrupt, prodigal, or lunatic by the law of his domicile (*Worms v. de Valdor*, 1880, 49 L. J. Ch. 261; and see FOREIGN DIVORCE; FOREIGN MARRIAGE). Nor will they recognise a right to inherit land under English

law except by persons born in wedlock of a marriage which would have been valid if celebrated in England (*Atkinson v. Atkinson*, 1882, 21 Ch. D. 100; Dicey, *Conflict of Laws*, 477-483, 497-507).

Apart from this insular peculiarity, the English Courts will accept the judgments of the Courts of the domicile of the father as determining questions of the legitimacy of the children for purposes of succession to property situate in England (*In re Goodman*, 1881, 17 Ch. D. 266; *Andros v. Andros*, 1883, 24 Ch. D. 637; *Doglioni v. Crispin*, 1860, L. R. 1 H. L. 301).

[*Authorities*.—Phillimore, *Int. Law*, vol. iv.; Phillimore in Clunet, 1897, p. 98; Piggott on *Foreign Judgments*, 2nd ed., 1884; Dicey, *Conflict of Laws*; Foote, *Private International Law*, 2nd ed.; Westlake, *Priv. Int. Law*, 3rd ed.; Smith, *Leading Cases*, 10th ed., vol. ii. 765-801.]

Foreign Jurisdiction.—A term used to express the relationship of a State to its subjects when they are beyond its territorial boundaries. Thus the State claims from its subjects and citizens the duty of allegiance wherever they may be resident. It may prescribe penalties for acts done by them abroad (see 24 & 25 Vict. c. 100, s. 9) (see EXTRA-TERRITORIAL CRIME), and it may determine the validity to be given to documents executed in other countries (see Lord Kingsdown's Act, 24 & 25 Vict. c. 114). See INTERNATIONAL LAW; WILL.

The term is also used in a more restricted sense to express the jurisdiction which certain foreign States have consented by treaty to allow the British Government to exercise within territorial limits where these foreign States have otherwise absolute power (see CAPITULATIONS). Such treaty powers within foreign territory receive their international validity from the royal prerogative (*q.v.*); but owing to doubts expressed in 1826 by the law officers as to the legality of the jurisdiction which was supposed to be still vested in consuls in the Ottoman Empire (see Hall, *For. Jur.* p. 9), recourse was had to legislation, which resulted in a series of Foreign Jurisdiction Acts, beginning with 6 & 7 Vict. c. 94 ("An Act to remove doubts as to the Exercise of Power and Jurisdiction by Her Majesty within divers countries and places out of Her Majesty's dominions, and to render the same more effectual," August 24, 1843).

This was followed by an Act passed in 1857 confirming an Order in Council relative to the exercise of jurisdiction in Siam (20 & 21 Vict. c. 75), the Foreign Jurisdiction Amendment Acts of 1865 and 1866 (28 & 29 Vict. c. 116, and 29 & 30 Vict. c. 87), the Siam and Straits Settlements Jurisdiction Act, 1870 (33 & 34 Vict. c. 55), and the Foreign Jurisdiction Acts of 1875 and 1878 (38 & 39 Vict. c. 85, and 41 & 42 Vict. c. 67), all of which were repealed by sec. 18 of the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), now in force.

This Act, which consolidates "the Acts relating to the exercise of Her Majesty's jurisdiction out of her dominions," sets forth that "whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means," the Queen "has jurisdiction within divers foreign countries," it is lawful for the Queen to exercise such jurisdiction or any other of the same kind she may hereafter have, in the same manner as if it had been acquired "by the cession or conquest of territory" (s. 1).

Leave is also given to the Queen in Council to direct that all or any of the following enactments (or any enactments for the time being in force amending or substituted for the same) in whole or in part or with modi-

fications, shall extend to any foreign country in which, for the time, Her Majesty has jurisdiction:—

The Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74); the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69); the Foreign Law Ascertainment Act, 1861 (an Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions, 24 & 25 Vict. c. 11; see FOREIGN LAW, *Proof of*); the Admiralty Offences (Colonial) Act, 1860 (an Act to enable the Legislatures of Her Majesty's possessions abroad to make enactments similar to the enactment of the Act ninth George the Fourth, chapter thirty-one, section eight, 23 & 24 Vict. c. 122); the British Law Ascertainment Act, 1859 (an Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof, 22 & 23 Vict. c. 63); the Evidence by Commission Act, 1859 (an Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals, 22 Vict. c. 20); the Foreign Tribunals Evidence Act, 1856 (an Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals, 19 & 20 Vict. c. 113); and the Admiralty Offences (Colonial) Act, 1849 (an Act to provide for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty, 12 & 13 Vict. c. 96). In addition to these are certain parts of other Acts, namely, sec. 51 of the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94); sec. 11 of the Merchant Shipping Act, 1867 (30 & 31 Vict. c. 134); Part X. of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); which are repeated and reproduced in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), viz. ss. 680 (1), 682–686, 688, 693, 696, 699, 700, 702–712; and secs. 7 and 11 of the Evidence Act, 1851 (14 & 15 Vict. c. 99).

The annexed schedule shows the orders now in force regulating the exercise of this jurisdiction. By these orders many of the Acts above mentioned have been applied, and in the case of Cyprus, the Extradition Acts and Foreign Enlistment Act. The orders regulate jurisdiction and procedure before the British Courts or consuls, and the terms on which appeals will lie to the Judicial Committee of the Privy Council, and such appeals are not unfrequently brought and raise difficult questions (*e.g.* *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431; *Pitts v. La Fontaine*, 1883, 5 App. Cas. 564; *Bulkeley v. Schutz*, 1871, L. R. 3 P. C. 764). The judges of these Courts are entitled to the same protection from suits as Courts of record (*Haggard v. Pelicier Frères*, [1892] App. Cas. 61). The jurisdiction is ordinarily limited to cases in which a British subject is defendant, and does not authorise them to entertain counterclaims by a British defendant against a foreign plaintiff (*Hart v. Gumpach*, 1872, L. R. 4 P. C. 439; *Imperial Japanese Govt. v. P. & O. S. N. Co.*, [1895] App. Cas. 644). In countries without settled government such Courts have in some cases jurisdiction as to land claims (*M'Arthur v. Cornwall*, [1892] App. Cas. 75).

ORDERS IN COUNCIL REGULATING FOREIGN JURISDICTION.

AFRICA.	DATE OF ORDER.	WHERE PUBLISHED.
Egypt . . .	See OTTOMAN EMPIRE.	
General . . .	Oct. 22, 1889 (Continent and Madagascar). June 28, 1892. July 17, 1893.	St. R. & O., Rev., vol. iii. p. 259. St. R. & O., 1892, p. 486. St. R. & O., 1893, p. 308.

• AFRICA. •
General (continued).

	DATE OF ORDER.	WHERE PUBLISHED.
	Aug. 7, 1894 (Admiralty).	St. R. & O., 1894, p. 131.
	July 7, 1897 (East Africa).	St. R. & O., 1897, No. 575.
	See OTTOMAN EMPIRE.	
Gambia (Hinterland) . . .	Nov. 23, 1893.	St. R. & O., 1893, p. 311.
Gold Coast (Hinterland).	Dec. 29, 1887.	St. R. & O., Rev., vol. iii. p. 521.
Lagos (Hinterland) . . .	Dec. 29, 1887.	St. R. & O., Rev., vol. iii. p. 523.
Madagascar	See AFRICA (General).	
Morocco	Nov. 28, 1889.	St. R. & O., Rev., vol. iii. p. 524.
	May 9, 1892 (Fees).	St. R. & O., 1892, p. 85.
Sjerra Leone (Hinterland)	Aug. 24, 1895.	St. R. & O., 1895, p. 272.
South Africa	May 9, 1891.	St. R. & O., 1891, p. 295.
	July 30, 1891.	St. R. & O., 1891, p. 298.
	Dec. 12, 1891.	St. R. & O., 1891, p. 307.
	July 18, 1894 (Matabeleland).	St. R. & O., 1894, p. 133.
	Oct. 3, 1895 (Matabeleland).	St. R. & O., 1895, p. 263.
	June 29, 1896 (British Jurisdiction).	St. R. & O., 1896, p. 117.
	Jan. 15, 1897 (Amatongaland).	St. R. & O., 1897, No. 89
Egypt	See OTTOMAN EMPIRE.	St. R. & O., Rev., vol. iii. p. 697.
Tripoli	See PROTOCOL, Feb. 12, 1873.	
Tunis	Dec. 31, 1883.	Abolishes Consular Jurisdiction.
Zanzibar ¹	July 7, 1897.	St. R. & O., 1897, No. 576.

ASIA.

	March 9, 1865.	
	May 13, 1869.	
	April 30, 1877.	
	Oct. 23, 1877.	
China	Aug. 14, 1878.	St. R. & O., Rev., vol. iii. pp. 333-396.
Corea	Oct. 25, 1881.	
Japan	June 26, 1884.	
	Sept. 9, 1884.	
	April 3, 1886.	
	Aug. 3, 1886.	
	Aug. 7, 1894 (Admiralty).	
Cyprus	See OTTOMAN EMPIRE.	St. R. & O., 1894, p. 131.
Muscat	Nov. 4, 1867.	St. R. & O., Rev., vol. iii. p. 574.
Persia	Dec. 13, 1889.	St. R. & O., Rev., vol. iii. p. 698.
Persian Coasts & Islands	Dec. 13, 1889.	St. R. & O., Rev., vol. iii. p. 796.
	Oct. 3, 1895.	St. R. & O., 1895, p. 271.
Siam	Nov. 28, 1889.	St. R. & O., Rev., vol. iii. p. 818.
Turkey in Asia	See OTTOMAN EMPIRE.	
EUROPE.		
Turkey	See OTTOMAN EMPIRE.	
OTTOMAN EMPIRE.		
Cyprus ²	Sept. 14, 1878 (Government).	St. R. & O., vol. iii. p. 397.
	May 18, 1881 (Neutrality).	St. R. & O., vol. iii. p. 399.
	July 15, 1881 (Privy Council Appeals).	St. R. & O., vol. iii. p. 412.
	July 15, 1881 (Extradition).	St. R. & O., vol. iii. p. 415.
	May 3, 1882 (Currency).	St. R. & O., vol. iii. p. 426.
	Nov. 30, 1882 (Legislative Council).	St. R. & O., vol. iii. p. 428.
	Nov. 30, 1882 (Courts of Justice).	St. R. & O., vol. iii. p. 436.
	Feb. 14, 1883 (Courts of Justice).	St. R. & O., vol. iii. p. 516.
	Feb. 14, 1883 (Legislative Council).	St. R. & O., vol. iii. p. 517.

¹ Zanzibar became a Protectorate in 1890 (*Gazette*, Nov. 4, 1890).

² Cyprus is subject to the suzerainty of the Sultan of Turkey, and is under the Foreign Jurisdiction Acts.

OTTOMAN EMPIRE.
Cyprus (*continued*).

DATE OF ORDER.	WHERE PUBLISHED.
Dec. 31, 1883 (Removal of Prisoners).	St. R. & O., vol. iii. p. 518.
Aug. 3, 1886 (Consolidated Charges).	St. R. & O., vol. iii. p. 519.
Aug. 3, 1886 (Evidence by Commission).	St. R. & O., vol. iii. p. 520.
May 9, 1892 (Currency).	St. R. & O., 1892, p. 41.
Nov. 23, 1893 (Admiralty).	St. R. & O., 1893, p. 309.
Feb. 2, 1895 (Coinage).	St. R. & O., 1895, p. 264.
Mar. 8, 1895 (Extradition).	St. R. & O., 1895, p. 266.
Dec. 12, 1895 (Extradition).	St. R. & O., 1895, p. 267.
Dec. 12, 1873.	St. R. & O., Rev., vol. iii. p. 587.
July 7, 1874 (Egypt).	St. R. & O., Rev., vol. iii. p. 688.
May 13, 1875.	St. R. & O., Rev., vol. iii. p. 689.
Feb. 5, 1876 (Egypt).	St. R. & O., Rev., vol. iii. p. 690.
May 3, 1882.	St. R. & O., Rev., vol. iii. p. 691.
Dec. 31, 1883 (Tunis).	St. R. & O., Rev., vol. iii. p. 697.
March 21, 1890.	St. R. & O., 1890, p. 707.
Feb. 23, 1891 (Fees).	St. R. & O., 1891, p. 300.
Nov. 24, 1891 (Tribunals).	St. R. & O., 1891, p. 305.
Aug. 7, 1894 (Admiralty).	St. R. & O., 1894, p. 131.
Feb. 2, 1895.	St. R. & O., 1895, p. 268.
March 8, 1895.	St. R. & O., 1895, p. 269.
Oct. 26, 1896.	St. R. & O., 1896, p. 120.

GENERAL.

PACIFIC OCEAN.
Pacific Ocean

March 15, 1893. St. R. & O., 1893, p. 312.

Cp. *Sayad Muhammad Jusuf. ud Din*, 1897, 76 L. T. 813.

Where a foreign country is not subject to any Government from whom the Queen might obtain jurisdiction in the manner recited by the Act, Her Majesty has jurisdiction over her subjects for the time being resident in or resorting to that country within the meaning of the other provisions of the Act (s. 2).

The persons who exercise the foreign jurisdiction of the Crown in places out of Her Majesty's dominions are: (1) Diplomatic agents; (2) naval and military officers; (3) consular officers; (4) in Cyprus, South Africa, and the Western Pacific an officer called a high commissioner, and in the Oil Rivers Protectorate an imperial commissioner.

[*Authorities.*—Hall, *Foreign Jurisdiction of the British Crown*, Oxford, 1894; Piggott, *Exterritoriality*. See EXTRA-TERRITORIAL CRIME; ORDER IN COUNCIL.]

Foreign Law.—The English Courts do not take cognisance (see COGNISANCE, JUDICIAL) of the laws, usages, or customs of foreign States—a term which, for this purpose, includes the Colonies (*Prowse v. European and American S. S. Co.*, 1860, 13 Moo. P. C. 484), the Channel Islands (*Brenan's case*, 1847, 10 Q. B. 498) and Scotland (*query*, however, whether it includes Ireland, whose laws are substantially identical with those of England, *Reynolds v. Fenton*, 1846, 3 C. B. 194). Such laws, etc., must be proved as facts by the evidence of experts, unless steps are taken under the British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), or the Foreign Law Ascertainment Act, 1861 (24 & 25 Vict. c. 11), to obtain an opinion on the subject from a Superior Court of the country whose laws are under dispute (see Taylor, *ibv.*, 9th ed., vol. i. p. 8). We shall consider first, and briefly, the provisions of these statutes, and then the general rules as to the proof of foreign law by expert evidence.

Ascertainment of British Law.—If in any action (which includes—see

Act of 1859, s. 5—any judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical) depending in any Court within Her Majesty's dominions, such Court thinks it desirable to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law there is different from that of the part in which the Court is situate, it may direct a case to be prepared, setting forth the facts as (a) ascertained by a jury or other competent mode, or (b) agreed upon by the parties, or (c) if they differ, settled by such person or persons as the Court may appoint. After the case so prepared has been approved by the Court or a judge thereof, the questions of law are settled and an order is made remitting these together with the case (cp. *Guthrie*, 1888, 7 Rettie, 1141) to the other Court (which must be a Superior Court (cp. s. 5)) for its opinion. Any of the parties to the action may petition the Court whose opinion is to be taken to be heard by counsel (s. 1). A copy of the opinion when pronounced, certified by an officer of the Court pronouncing it, is to be given to each of the parties to the action, and is to be deemed to be a correct record of such opinion (s. 2). The Court making the remit will, on motion of any of the parties to the action, apply the opinion to the facts, or, when it has been obtained before trial, submit it to the jury with the other facts as evidence, or conclusive evidence; as the Court may think fit, of the foreign law therein stated (s. 3). The opinion may be reviewed and reversed by Her Majesty in Council, or the House of Lords (s. 4). See, to cases under this statute, *Lord v. Colvin*, 1855, 1 Drew. & Sm. 24 (remit to Court of Session); *Logan v. Princess of Coorg*, 1862, 30 Beav. 632 (remit to Supreme Court of Calcutta). It should also be noted under this head that sec. 3 of the Foreign Law Ascertainment Act, 1861, enables the Superior Courts within Her Majesty's dominions to pronounce opinions on cases remitted by foreign Courts.

Ascertainment of Foreign Law.—The provisions of the Act of 1861 are *mutatis mutandis* the same as those of the Act of 1859, except that they are to be brought into force by conventions. So far no such convention has been entered into, and the Act is therefore, as yet, a dead letter.

Proof of Foreign Law, etc., by Expert Evidence.—Foreign law cannot be proved by codes, statutes, text-books, etc., although the skilled witness, who alone is competent to prove it, may refresh his memory by reference to these, and adopt the statements contained in them as part of his testimony (cp. *Sussex Peerage* case, 1844, 11 Cl. & Fin. 114; *Lord Nelson v. Lord Bridport*, 1846, 8 Beav. 547). When once, however, a foreign code or statute has been vouched by competent expert evidence, the Court may construe it for itself (see *Concha v. Murrietta*, 1889, 40 Ch. D. 543). Only (a) a lawyer belonging to the country whose law is in question, or (b) an official whose position requires and therefore presumes a sufficient knowledge of such law, is a competent witness for this purpose. As examples of (a) may be cited the cases of a judge, advocate, barrister, and solicitor; the law of a foreign country cannot, however, be proved by a jurisconsult who has studied it only at a university in another country (*Bristow v. Sequeville*, 1850, 5 Ex. Rep. 275; and see *In re Bonelli*, 1875, 1 P. D. 69, where Sir James Hannen refused, on a point of Italian law, the evidence of an English barrister who had merely studied that law in this country; and *Cartwright v. Cartwright*, 1878, 26 W. R. 684, where it was held that the law of Canada could not be proved by a barrister practising before the Judicial Committee, though it is the Supreme Court of Appeal for the colony). As examples of (b) may be given the cases of a colonial Attorney-General, though not a barrister (see *Sussex Peerage* case, *supra*; *R. v. Picton*,

1806, 30 How. St. Tr. 336; *Ward v. Dey*, 1849, 7 N. C. (E. & M.) 96, 101; a Roman Catholic priest—coadjutor to a vicar-apostolic—the matrimonial law of Rome (*Sussex Peerage* case, *supra*; but see *R. v. Savage*, 1876, 13 Cox C. C. 178); a Persian ambassador (*In the goods of Dost Aly Khan*, 1880, 6 P. D. 6). Unless he comes within one or other of these general classes, a witness cannot prove a foreign law, even though the Court is satisfied that he has ample knowledge of it (*Sussex Peerage* case, *supra*, overruling *R. v. Dent*, 1843, 1 Car. & Kir. 97). *Aliter*, however, in the case of foreign customs or usages (see *Vander Donckt v. Thellusson*, 1849, 8 C. B. 812).

[*Authorities*.—Taylor, *Ev.*, 9th ed.; Best, *Ev.*, and American notes therein.]

Foreign Market.—As to the liability of agent in connection with, see PRINCIPAL AND AGENT.

Foreign Marriage.—From the point of view of English law the term foreign marriage applies to three distinct classes of marriages—(1) Those celebrated outside England under the forms of the *lex loci celebrationis*; (2) those celebrated under foreign law in England; (3) those celebrated outside England in accordance with the provisions of the common law or of an Imperial statute.

No distinction is taken for this purpose between a marriage on British territory outside England and foreign territory.

1. A marriage will be treated as valid in English law if valid by the local law of the place where it is celebrated.

This is the rule as laid down by Lord Stowell in *Ruding v. Smith*, 1821, 1 St. Tri. N. S. 1053. It is supported by prior and subsequent authority, *eg. Herbert v. Herbert*, 1819, 2 Hag. Con. 263, and *Swift v. Kelly*, 1835, 3 Kn. P. C. 257; *In re Alison's Trusts*, 1874, 31 L. T. 638; as to which see *Parapano v. Happaz*, [1894] App. Cas. 165. It was applied irrespective of the domicile of the parties, so that even Gretna Green marriages between minors were treated as valid in England (*Crompton v. Bearcroft*, 1767, 2 Hag. Con. 376) until Lord Brougham's Act (*Lawford v. Davis*, 1878, 4 P. D. 61).

The rule applies primarily only to the formalities attending the marriage (*Middleton v. Janverin*, 1802, 2 Hag. Con. 437). If they are not in accordance with the *lex loci*, the marriage will not be recognised here.

A difficult question, not yet satisfactorily solved, arises as to the law by which the personal capacity of the parties to marry is to be governed. The tendency of the cases is towards the opinion that British subjects not domiciled abroad, and not capable of contracting a lawful marriage by the law of their domicile, cannot validly marry abroad, *i.e.* that personal capacity to marry must be determined by the law of the domicile, and not by the *lex loci celebrationis* (*Brook v. Brook*, 1861, 9 H. L. 193; *Sottomayor v. De Barros*, No. 1, 1877, 3 P. D. 1; *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67). But it is difficult to reconcile these cases with *Sottomayor v. De Barros*, No. 2, 1879, 5 P. D. 94, except by saying that for a marriage in England the *lex loci* rules questions of capacity as well as of form. If this be correct, there is a lack of correspondence between the English notions of municipal and of international law. It is not definitely decided that the domicile of both parties must be such as to create a personal incapacity to marry, in order to

invalidate a foreign marriage; but apparently both must be equally capable of entering into the contract (*Mette v. Mette*, 1859, 1 Sw. & Tr. 416).

There is also a tendency in England to treat certain incapacities to marry as not being personal incapacities, but as belonging to the ceremony, e.g. the need of parental consent to the marriage of French people is not regarded as invalidating such a marriage in England under English law, although the marriage if it had taken place in France would be invalid here; and in *Sottomayor v. De Barros*, No. 2, 1879, 5 P. D. 94, Sir J. Hannen treated in the same way the incapacity under Portuguese law of first cousins to marry without a papal dispensation. Prohibition of the remarriage of a divorced person by the law under which the divorce was granted, has been held not to affect his right to remarry elsewhere (*Scott v. A.-G.*, 1886, 11 P. D. 128; *Warter v. Warter*, 1890, 15 P. D. 152); and an Englishman under attaind has been held able to contract abroad a marriage valid in England (*Kynnaird v. Leslie*, 1866, L. R. 1 C. P. 389). On the other hand, the Royal Marriages Act, 1772 (12 Geo. III. c. 11), is held to create an absolute disability to marry legally, except in accordance with its provisions (Dicey, *Conflict of Laws*, 640; *Sussex Peerage* case, 1844, 11 Cl. & Fin. 85). In the same way marriage would be valid here between American citizens, one black and the other white; or between a foreign monk and a foreign nun; and marriage abroad between British subjects who are within the prohibited degrees of consanguinity or affinity will not be recognised in England unless they were domiciled where they married, and even in that case the children cannot inherit real property in England (*Mette v. Mette*, 1859, 1 Sw. & Tr. 416; and see *Fenton v. Livingston*, 1859, 3 Macq. H. L. 497; Dicey, p. 643). The rules as to the validity of a foreign marriage do not apply to marriages under the laws or customs admitting of polygamy (*Ordlaffer v. Ordlaffer*, 1850, 10 Moo. P. C. 375; *Hyde v. Hyde*, 1866, L. R. 1 P. & M. 130; *In re Ulee*, 1885, 54 L. T. 286; *In re Bethell*, 1888, 38 Ch. D. 220). Marriage under the law of Japan does not fall within this exception (*Brinkley v. A.-G.*, 1890, 15 P. D. 76).

2. Marriages solemnised in England in a foreign embassy house would apparently be recognised as valid under English law if both the parties were foreigners, subjects of the country of the ambassador, or entitled to diplomatic privileges (*Ruding v. Smith*, 1821, 1 St. Tri. N. S. 1066; *Pertreis v. Tondear*, 1790, 2 Hag. Con. 136). But the question has never been judicially determined. Marriages solemnised in England outside embassy houses between foreigners and by foreign rites are not valid by English law unless the place in which they are celebrated is registered for marriage and the formalities required by the English law are complied with. This condition of the law led to the passing of the Greek Marriages Act, 1884 (47 & 48 Vict. c. 20) (see *Zarifi v. A.-G.*, 1885, 1 T. L. R. 683; *Scaramanga v. A.-G.*, 1889, 14 P. D. 83). Until 1837 marriages between Jews formed an exception to this rule (see Geary on *Marriage*, 97).

Marriages within the lines of a British army of occupation, whether peaceable or hostile, in a foreign country, appear to have been valid at common law if one party was subject to military law and an Anglican priest officiated (*R. v. Brampton*, 1808, 10 East, 282; *Burn v. Farrar*, 1819, 2 Hag. Con. 369; *Ruding v. Smith*, 1821, 1 St. Tri. N. S. 1053; *Waldegrave Peerage* case, 1837, 4 Cl. & Fin. 649).

The rule was recognised and extended in the Act of 1823 (4 Geo. IV. c. 9), and now under sec. 22 of the Act of 1892 (55 & 56 Vict. c. 23) applies to all marriages whether of British subjects or not solemnised

within the lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad.

Marriages at sea on British public or private ships appear to be valid at common law if performed by an episcopally ordained minister, even without licence or banns (*Culling v. Culling*, [1896] Prob. 116). If performed by the captain, they seem to be invalid (*Du Moulin v. Druitt*, 1860, 13 Ir. R. C. L. 212).

In the case of marriage on a British merchant ship for which an official log is required, the master must enter in the log every marriage taking place on board the ship, with the names and ages of the parties (57 & 58 Vict. c. 60, s. 240 (6)), and masters of foreign-going ships whose crew is discharged in the United Kingdom must deliver it up (s. 242 (1)).

Marriages may now be lawfully performed on a British public vessel on a foreign station (if one party to the marriage is a British subject) by commanding officers of such rank and of such ships as are authorised for the purpose by the Admiralty instructions without a Secretary of State's warrant, or who are made marriage officers by a marriage warrant of the Secretary of State (55 & 56 Vict. c. 23, s. 12; Marriage Order in Council, 1895, art. 10 (St. R. & O., 1895, p. 629)). Marriage is not to be celebrated on a public ship if at the port or place where she is sufficient facilities for marriage exist by the local law or under the Foreign Marriage Act, 1892 (art. 10 (2)). Not less than three weeks' notice must be given in such manner as to satisfy the commander that the notice would suffice in England, and that the marriage is not clandestine (art. 10 (3)). Breach of the regulations does not invalidate the marriage (55 & 56 Vict. c. 23, s. 13).

It is not clear whether the Act of 1892 invalidates marriages on a public vessel celebrated in accordance with the old common law of marriage. If they are celebrated outside British territorial waters, the statute law as to marriage in the United Kingdom would seem inapplicable. And the same observation applies to British merchant vessels, with this difference that public ships are not, while private ships are, when in foreign territorial waters, subject to the *lex loci* (see Dicey, *Conflict of Laws*, p. 633).

3. A marriage between British subjects on land abroad appears to be invalid in England unless it is celebrated in accordance with the local law or by or in the presence of a marriage officer under the Foreign Marriage Act, 1892.

The common law (prior to Lord Hardwicke's Act, 26 Geo. II. c. 33) as to marriage required the presence and assent of an episcopally ordained minister of the Anglican, Roman, or Eastern Church (*Lautour v. Teesdale*, 1816, 8 Taun. 830; *R. v. Millis*, 1843, 10 Cl. & Fin. 534; and *Beamish v. Beamish*, 1861, 9 H. L. 274; *In re M'Loughlin*, 1878, 1 L. R. Ir. 421), except perhaps where his presence could not be obtained. There are cases in which marriages *per verba de presenti* in parts of India and Australia have been held valid, it being proved that no clergyman could be found (*Catterall v. Catterall*, 1845, 1 Rob. Eccl. 304; 1847, 1 Rob. Eccl. 580; *Maclean v. Cristall*, 1849, 7 No. Ca. (Eccl. & M.), appendix, p. xvii., a decision of the Supreme Court of Bombay).

But a marriage celebrated between British subjects in 1834 at Smyrna before the British consul without the presence of a clergyman was held void (*Catherwood v. Caslon*, 1844, 13 Mee. & W. 261), as was a marriage celebrated in 1817 on a British transport *en route* for New South Wales by the civil commandant of the vessel (*Du Moulin v. Druitt*, 1860, 13 Ir. R. C. L. 212).

Various Acts were passed on this subject from 1823 to 1891, which are enumerated, repealed, and now consolidated in the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23).

The validity given by the Act is, of course, only under British law (*Este v. Smyth*, 1854, 18 Beav. 112), and the law of the State in which the marriage actually took place does not in all cases recognise the validity of a marriage under the Act. Thus the French Courts deny the validity of a marriage between a British and a French subject at the British Embassy House in Paris (*French v. Morgan*, 1 Clunet, 71; *Tripet v. Barret*, 1 Clunet, 73; 2 Fraser, *Husband and Wife*, 2nd ed., 1139, 12 Clunet, 659), although it would certainly be valid in England (*Lloyd v. Petitjean*, 1839, 2 Curt. Eccl. Cas. 251). They deny that the embassy is extraterritorial, so as to make British law the *lex loci celebrationis*, and say that a foreign ambassador's privileges do not entitle him to interfere *aux actes de la vie civile intéressant les indigènes du pays auquel il est accrédité*. Cp. *In re Wright*, 1856, 25 L. J. Ch. 621.

Besides the Act there are two Orders in Council made under it in 1892 (St. R. & O., 1892, p. 625, and 1895, St. R. & O., 1895, p. 450), which with the Act sums up what, for practical purposes, is the whole law as to British marriages celebrated out of the United Kingdom.

The scheme of the Act is to make marriages celebrated under it as valid as if they had been duly solemnised in the United Kingdom. It constitutes certain persons marriage officers by or in whose presence marriages may be celebrated (s. 11), who are appointed either by written warrant from a Secretary of State, or are authorised by the marriage regulations of 1892 to act without a written warrant, *i.e.*—

(a) British ambassadors or officers for the time being performing their duties, or any secretary attached to the embassy appointed in writing to act as marriage officer by the head of the embassy (1892, art. 1);

(b) Commanding officers of such rank and of such British public vessels as are authorised under Admiralty instructions to act as marriage officers (1892, art. 10).

Consuls appear to act only under marriage warrants.

In addition to the provisions as to marriage on a ship or in British lines, the Act permits marriage—

(i.) In a British embassy house, *i.e.* the residence of the ambassador, and every place within its precincts and curtilage, and any church or chapel annexed to the house, or for the time being and with the consent of the foreign Government, as the embassy chapel;

(ii.) In the official house of a British consul (Order 1892, art. 7);

(iii.) In a building specified in an authority to a high commissioner or resident in a foreign country to act there as a marriage officer (Order 1892, art. 9).

Provisions are made as to notices, oaths, *retocs*, *caveats*, fees, and the like (Act, ss. 2–8; Order of 1892, art. 6), and as to registration and transmission here annually of a list of marriages (ss. 9, 10).

The marriage is not to be celebrated in an embassy or consulate if a marriage by the local law would be valid in England, unless (a) both parties are British subjects; (b) one is a British subject and the other is not a citizen or subject of the State in which the embassy or consulate is; (c) one is a British subject and the other is a citizen or subject of the country, but sufficient facilities do not exist for solemnising the marriage in the country in accordance with its law (Order of 1892, art. 4); and where the woman is British and the man an alien, the marriage officer must satisfy himself that the marriage will be valid by the law of the husband's nationality (Order of 1892, art. 5).

He may also refuse to solemnise a marriage if, in his opinion, it would be contrary to international law or the comity of nations (Act, s. 19).

The marriage officer, where a *caveat* is entered against a marriage, may either refer the matter to the Registrar-General, or refuse to permit the marriage to be solemnised. The marriage officer must conform to the decision of the Registrar-General in a case submitted to him, or of the Secretary of State, on an appeal to him from a refusal by the officer to solemnise a marriage (Act, ss. 5, 19; Order 1892, art. 4 (2)).

A consul need not attend marriages solemnised under the local law except at the place where he is appointed to reside, and on payment of his fees; nor is he bound to attend at or to register such a marriage unless he is a marriage officer, or authorised to register such marriages (Order 1892, art. 8; Order 1895).

[*Authorities.*—Geary on *Marriage*, *passim*; Westlake, *Priv. Int. Law*, 3rd ed., 44, 55–65; Dicey on *Conflict of Laws*, 629; Marriage Commission Report, Parl. Pap., 1868, a.]

Foreign Office.—In foreign affairs the Crown is the representative of the nation, and as such possesses the sole power of making war, peace, and treaties, sending and receiving ambassadors, etc. Treaties made by private individuals are not internationally binding until ratified by the Crown; and, when so ratified, the sovereign rights acquired under them enure for the benefit of the Crown. In the exercise of this prerogative, as in the other departments of executive government (*q.v.*), the Crown acts on the advice of a responsible minister; and since 1782 a special Secretary of State (*q.v.*) has been appointed for foreign affairs. It is his duty to advise the Crown in these matters; he is present when the representatives of foreign Powers are received in audience, and it has been customary during the present reign for the sovereign to keep him informed regarding informal communications between the Crown and foreign Courts. On the other hand, the Queen in 1850 expressed her desire to be informed of the course of negotiations with foreign Powers, and to have despatches submitted to her through the Prime Minister before they were sent out, in sufficient time to allow her to form an opinion. Lord Palmerston's failure to conform to this requirement, and his attempt to commit the country to an approval of Louis Napoleon's *Coup d'Etat* in 1851 without communicating with the Crown or the Prime Minister, were visited with dismissal. In some instances despatches so submitted are believed to have been referred back to the Foreign Secretary or the Cabinet with suggested modifications. The Foreign Secretary in more important matters only acts after consultation with the Prime Minister, when the two offices are in separate hands, and with the Cabinet, of which he is always a member. He is represented in the House of Parliament, to which he does not himself belong, by a Parliamentary Under Secretary of State, and has under him as well a permanent Under Secretary of State and a large staff of permanent officials. The constitutional limitations in the treaty-making power of the Crown will be dealt with under TREATIES.

[*Authorities.*—See further, Anson, *Law and Custom of the Constitution*; Todd, *Parliamentary Government in England*, ed. Walpole.]

Foreign Port.—A British ship in a foreign port is within the jurisdiction of the Admiralty, and a criminal offence committed on board her, whether by a foreigner or a British subject, may be tried in this country (*R. v. Carr*, 1882, 10 Q. B. D. 76); as may also be an offence com-

mitted ashore in the port by a British seaman or a person who has within three months been employed in a British ship (M. S. A., 1894, s. 687; and see BRITISH SHIP). The civil jurisdiction of the Admiralty equally extends to foreign ports, and the Admiralty Division has jurisdiction over collisions happening there, whether between British or foreign ships (see COLLISIONS AT SEA). Foreign ports where the Queen has jurisdiction under the Foreign Jurisdiction Act (e.g. treaty ports in China) may be made ports of registry for British ships by Order in Council (M. S. A., s. 88). The captain of a British (not passenger) ship which stays in a foreign port for forty-eight hours must deposit such documents there, as the agreement with the crew, indentures and assignments of apprenticeships (if the ship has them), with a consular officer there for safe custody during the ship's stay there, under penalty (s. 257). For the law as to supplies and repairs furnished to British ships in foreign ports, see NECESSARIES.

Foreign Seaman.—Foreigners serving in British ships are in the position of British seamen, and their rights and duties are the same as those of seamen who are British subjects (see BRITISH SHIP and SEAMAN). The position of foreigners serving in foreign ships, although mostly dependent on the law of the flag, is to some extent affected by English law, e.g. in questions of wages where his ship ends her voyage in a British port. In such a case, unless he is prevented by the terms of his contract of service, a foreign seaman can sue the ship for his wages and enforce his claim by arresting her in the Admiralty Division. The Court, however, will not allow him to do so unless he has given notice of the proceedings to the consul of the country to which the ship belongs; and if the consul objects on good grounds to the Court exercising its jurisdiction, the Court will not generally do so (*The Vrow Maria*, 1813, 1 Dod. 234, where the crew of an alien enemy ship were allowed to sue; *The Wilhelm Frederick*, 1823, 1 Hag. Adm. 138; *The Golubchick*, 1840, 1 Rob. W. 143; *The Octavie*, 1863, B. & L. 215; *The Nina*, 1867, L. R. 2 Ad. & Ec. 44, and 2 P. C. 38; *The Leon XIII.*, 1883, 8 P. D. 121; Order 5, r. 16 (b)). Foreign seamen improperly discharged in a British port may be allowed to recover the expenses of returning home in addition to their wages (*The Madonna d'Idra*, 1811, 1 Dod. 37; *The Union*, 1860, Lush. 128). Deserters from foreign ships may be apprehended in British ports and given up, if facilities are granted by the country to which their ships belong for recovering and apprehending deserters from British ships in that country, and an Order in Council so provides; and any person concealing such a deserter is liable to a penalty (M. S. A., s. 238). Existing agreements between Great Britain and certain other foreign nations for interchange of facilities for relieving distressed seamen are kept in force (s. 745 (1)), and new ones may be made (ss. 734, 190–194). If destitute seamen belonging to a country which has no consul in Great Britain are brought to the United Kingdom in a foreign ship and left there, the person who is the consignee of the ship at the time when the seamen are so left is liable to a fine of £30, unless he can show that they left the ship without the consent of the master, or that they were given the means of returning to their native country, or that whence they were shipped (s. 184). See SEAMAN.

Foreign Security.—By sec. 113 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), "the term 'foreign security' means and includes

every security for money by or on behalf of any foreign or colonial State, Government, municipal body, corporation, or company bearing date or signed after the 3rd day of June 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note)—

- "1. Which is made or issued in the United Kingdom ;
- "2. Upon which any interest is payable in the United Kingdom ;
- "3. Which is assigned, transferred, or in any manner negotiated in the United Kingdom."

The duty charged under this Act was the same as on a mortgage—viz. 2s. 6d. per £100, and on a transfer 6d. per £100 was payable. This duty of 2s. 6d. was chargeable whether the security was to bearer or to registered holder (Alpe, 164). Foreign securities bearing date or signed before the date mentioned in the section were not charged with duty (Alpe, 163). The law was soon changed, for by 34 Vict. c. 4, which received the Royal assent on March 30, 1871, sec. 113 of 1870 was repealed, and a provision was substituted which was identical with it down to the end of sub-clause (1); but sub-clauses (2) and (3) were replaced by the following words:—“(2) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom.”

The issue of a security under this section was held to be “its first creation by the company, who give thereby a right of action in favour of some person to whom that bond is given” (*Grenfell v. C. I. R.*, 1876, 1 Ex. D. 242, 249). When, therefore, an American company sold its bonds in New York to a purchaser, and on payment of the price handed them to him, the name of the payee being in blank, and the purchaser sent the bonds to England for sale, it was held that the issue was completed in New York and that no duty was payable by the sub-purchaser in England (*ibid.*). The interest in that case was payable at the company's office in New York, and therefore unless the bonds were issued in the United Kingdom they were not within the section.

But, by the Customs and Inland Revenue Act, 1885, s. 21, the following provision was made:—“In lieu of the stamp duties payable upon . . . a foreign security bearing date or signed, or offered for subscription, after the passing of this Act [*i.e.* August 6, 1885], and transferable by delivery, there shall be charged a duty” of 1s. per £10 “of the money thereby secured.” By the same section the duty to be payable “upon any such security given in substitution for a like security, duly stamped,” was 6d. for every £20 of the money secured. The section concluded with the following provision:—“The term ‘foreign security’ shall not include a security by or on behalf of any colonial government, but shall otherwise have the meaning assigned to it by” the Act of 1871, “and shall also include a security which, though originally issued to the holder out of the United Kingdom, is offered by him for subscription and given or delivered to a subscriber in the United Kingdom.” The last sentence was apparently framed to meet the decision in *Grenfell's* case.

The whole of the section was repealed by the Stamp Act, 1891, and by sec. 122 of that Act “the expression ‘marketable security’ means a security of such a description as to be capable of being sold in any stock market in the United Kingdom.” By sec. 82 “marketable securities for the purpose of the charge of duty thereon include . . . (b) a marketable security by or on behalf of any foreign State or Government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security) bearing date or signed after the 3rd day of June 1862—

- “(1) Which is made or issued in the United Kingdom ; or

"(2) Which, though originally issued out of the United Kingdom, has been after the 6th day of August 1885, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or

"(3) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and

"(c) A marketable security by or on behalf of any colonial government, which if the borrower were a foreign government would be a foreign security (hereinafter called a colonial government security)."

The first schedule to the Act imposes the following duties:—If the security is a colonial government one, or is not transferable by delivery, or is so transferable, but was dated or signed or offered for subscription before August 6, 1885, the same *ad val.* duty as on a mortgage. If the security is not a colonial government one, but is transferable by delivery, and dated, signed, or offered for subscription after August 6, 1885, the duty of 1s. for every £10, or fraction thereof, thereby secured—or if merely given in substitution for a like duly stamped security, 6d. for every £20 or fraction thereof.

The duty payable on a "transfer, assignment, disposition, or assignation" of *any* marketable security, is, on a sale, the same as on an ordinary conveyance or transfer on sale, and in the case of a mortgage, the rate of duty depends on whether the security is under hand only or by deed (see as to the former the title "Agreement" in Sched. I. to the Act of 1891, and sec. 23; and as to the latter, "Mortgage," and sec. 86).

The Act of 1891, in sec. 82, subsec. (2), and sec. 85, defined a "foreign or colonial share certificate," and imposed annual duties on the transfer by delivery of marketable securities, and the delivery of foreign or colonial share certificates, and in Sched. I. under the head of "Marketable Security" the rates of duty are pointed out; but these clauses and the part of the schedule last mentioned, and the duties thereby imposed, were repealed by sec. 4 of the Customs and Inland Revenue Act, 1893. Sec. 83 of the Act of 1891 imposes a fine of £20 on any person who, in the United Kingdom, "makes, issues, assigns, transfers, negotiates, or offers for subscription, any foreign security or colonial government security not being duly stamped"; and sec. 84 enables the Commissioners in certain cases to allow foreign or colonial securities to be stamped without penalty.

As to the Indian securities in which trustees are, unless expressly forbidden by their trust instrument, allowed to invest their trust funds, see the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1.

Foreign Ship.—Generally speaking, the same law applies to foreign ships as to British ships, and in cases of collision, salvage, and wages and ownership (with some limitations) (*q.v.*), it is immaterial whether the ship proceeded against is British or foreign, for in both cases a remedy *in rem*, enforceable by arrest, is available. Certain statutory enactments, however, particularly refer to foreign ships. A foreign ship on becoming a British ship must be registered by the name which she has borne just previously, unless the Board of Trade previously give its written consent to another name (M. S. A., 1894, s. 47 (7)). The collision regulations apply to all foreign ships in British jurisdiction (s. 418); they may be inspected to see that they are properly provided with lights and fog-signals in accordance therewith (s. 420); and the regulations may be applied to

them when outside British jurisdiction, with the consent of their Governments (s. 424). A foreign ship which has done injury to property of British subjects, if it is found at any time afterwards in any port or river of the United Kingdom or within three miles of its coast, may be arrested, to give satisfaction (s. 688). (See COLLISIONS AT SEA.) Foreign ships are liable to life salvage when within British jurisdiction (s. 544). They must also comply with the regulations as to load lines and draught of water, or they may be detained, or their masters fined, unless the laws and regulations in force in their country relating to overloading and improper loading are certified by the Board of Trade to be equally effective with the provisions of the M. S. A. (in which case a ship belonging to that country, if proved to have complied with these regulations, may be exempted from liability to detention or any fine or penalty for non-compliance with the provisions of the Act), and provided that corresponding rights are extended by that country to British ships (s. 445). The provisions of the Act relating to the carriage of dangerous goods (*q.v.*) apply to foreign as well as to British ships (ss. 446-450). Foreign ships which have loaded any cargo at a port in the United Kingdom, and whilst there are unsafe by reason of overloading, improper loading, or under-manning, may be provisionally detained in order to be surveyed, provided that a copy of the order for provisional detention be forthwith served on the nearest consul of the country to which the ship belongs. The consul may require that she be surveyed, and this is performed by a Board of Trade surveyor and a surveyor chosen by the consul. If they agree, their decision determines the release or further detention of the ship; if they disagree, the detention continues, but the shipowner can appeal to a Court of survey, whose decision is final, and in such a case the consul may appoint an assessor for the appeal (ss. 459-462; M. S. A., 1897, 60 & 61 Vict. c. 59, s. 2). Foreign ships bringing deck timber cargoes in winter to a port in the United Kingdom from a port without it are liable to the same penalties as British ships in the like case (s. 451). Foreign shipowners, like British ones, may limit their liability in cases of loss of life, injury, or damage done by their ships without their actual fault or privity (ss. 503-509). Besides being liable to the general pilotage laws, foreign ships trading to the port of London are especially made liable to pilotage dues, and in case of dispute as to their draught of water they may be measured (ss. 622 ff. 627, and 629). For other liabilities of foreign ships, see PASSENGERS; WRECK. The Merchant Shipping Act also provides that by Order in Council any provisions of that Act may be applied to foreign ships, if the Government of their country so desire, and if there are no special provisions expressly made applicable to them by the consent of their Governments (s. 734). Such special provisions so applicable are those relating to salvage of life from them when outside British jurisdiction (s. 545), and to punishment of crimps boarding them (ss. 218, 219), on condition of reciprocity to British ships in the like case, and the collision and tonnage regulations (*ante*, and s. 84).

[*Authority.*—Temperley, *Merchant Shipping Act*, 1895, *passim*.]

Foreign Sovereign.—See EXTERRITORIALITY; INCOGNITO.

Foreign State.—See FOREIGN DIVORCE; FOREIGN JURISDICTION
FOREIGN LAW; FOREIGN MARRIAGE.

Foreign Warrant.—No warrant or writ of any foreign State can lawfully be served or executed on any person within the British dominions, except under the authority of a British Court or officer.

In the case of foreign penal laws this flows from the international rule that the penal laws of one State cannot be executed in another (*Huntington v. Attrill*, [1893] App. Cas. 150). But the rule, both as to civil and criminal process, may more justly be said to depend on the essential nature of independent and sovereign States, as recognised by international law, and as asserted in the statutes of Hen. VIII. with reference to the See of Rome (24 Hen. VIII. c. 12). In proceedings for extradition of fugitive criminals, the arrest in England is made under the warrant of the English magistrate, and not on the foreign warrant for arrest, and apparently the offender would be entitled to resist arrest except on English warrant (see *Rogers v. Van Valkenburgh*, 1860, 20 Up. Can. Q. B. 220; *Ex parte Garner*, 1868, 4 Lower Can. L. J. 59; *R. v. M'Holme*, 1881, 8 Ont. P. v. Rep. 452). The dicta of Brett, L.J., in *R. v. Weil*, 1882, 9 Q. B. D. 701, lack all authority but his own, and the Court had no jurisdiction in the case (*In re Woodhall*, 1888, 20 Q. B. D. 832). The provisions of Order 11 of the Rules of the Supreme Court are framed to prevent the English Supreme Court from serving its process abroad in violation of international law; but the practice apparently sanctioned thereby, of allowing service of an English writ instead of notice (Order 11, r. 6) on a British subject abroad, seems to go beyond the strict limits of national or territorial jurisdiction, and a judgment obtained after such service would probably have no international validity. So long as the present rule stands, apparently, service of the civil process of a foreign State on one of its subjects resident here would not be regarded as irregular, null, or illegal; but foreign Courts usually apply to the High Court or a British magistrate or, in the city of London, to the Lord Mayor by letters of request, to authorise or effect the service.

Foreign Waters.—See ADMIRALTY, THE; EXTERRITORIALITY; FOREIGN MARRIAGE; BRITISH SHIP; FOREIGN SHIP; SLAVE TRADE.

Forejudge.—This term still continues to be used in the preamble to the Army Annual Act, see 60 Vict. c. 7, to which it has been transferred from the Mutiny Acts. "Whereas no man can be forejudged of life or limb . . . within this realm by martial law or in any other manner than by the judgment of his peers and according to the known and established laws of this realm." In this recital it seems to mean prejudged or condemned without a fair trial. The derivation (*forisjudicatio*) and account of forejudge in Wharton (*s.v.*) lacks authority.

Forensic Medicine.—Forensic medicine is the science which deals with the application of every branch of medical knowledge to the purposes of the law. "Legal medicine," "State medicine," and MEDICAL JURISPRUDENCE, under the last of which headings the subject is treated of in this work, are practically synonymous.

Foresaid; Aforesaid; As aforesaid, etc.—These synonymous terms are used sometimes as adjectives, in which case they

mean simply "before indicated," and seldom give rise to difficulty; sometimes, as in *WILLS*, adverbially, as referential expressions determining generally not *who* shall take a legacy, but *how* the legatees shall take. See 1 Jarm. *Wills*, 9th ed., p. 701, n. (g); see also Stroud, *Jud. Dict.*, s.v. "Aforesaid."

Foreshore.

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1. *What Foreshore is*.—Lord Hale in his celebrated treatise, *De Jure Maris*, defines the foreshore or seashore as follows:—

The shore is that ground that is between the ordinary high-water and low-water mark; this doth *primâ facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. It is certain that that which the sea overflows, either at high spring tides or at extraordinary tides, comes not, as to this purpose, under the denomination of *litus maris*. . . . (Hale, *De Jure Maris*, ch. iv., quoted in Moore's *History of the Foreshore*, 378.) There seem to be three sorts of shores, or *litora marina*, according to the various tides, viz. (1) high spring tides, which are fluxes of sea at those tides that happen at the two equinoxials, and certainly this doth not *de jure communi* belong to the Crown. For such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject. And this is admitted of all hands; (2) spring tides, which happen twice every month at the full and change of the moon; and the shore in question is by some opinion not denominated by these tides neither; but lands overflowed with these fluxes ordinarily belong to the subject *primâ facie*, unless the king hath a prescription to the contrary. And the reason seems to be, because for the most part the lands covered with these fluxes are dry and maniorable, for at other tides the sea doth not cover them; and therefore, touching these shores, some hold that common right speaks for the subject unless there be an usage to entitle the Crown, for this is not properly *litus maris*; and therefore it hath been held that where the king makes his title to land as *litus maris* or *parcella litoris marini*, it is not enough for him to make it appear to be overflowed at spring tides of this kind; (3) ordinary tides or neap tides, which happen between the full and change of the moon, and this is that which is properly called *litus maris*, sometimes called *marettum*, sometimes *wardtum*, shore covered by ordinary flux of the sea (Hale, ch. vi., Moore, 393).

Elsewhere (*First Treatise*, Moore, 357) he says:—

The shore is not *quatenus hibernus fluctus maximus excurrit* as in the Roman law; better, *est totus ille locus vadosus et sabulosus inter aggeres et mare qui modo ab aestu maris occupatur modo ab ejusdem recessu denudatur*, which agrees with our occupation and use.

He also defines an arm of the sea as—

"that where the sea flows and reflows, and so far only as the sea so flows and reflows, so that the river of Thames above Kingston, and the river of Severn above Tewkesbury, though they are public rivers, yet are not arms of the sea. But it seems that although the water be fresh at high water, yet the denomination of arm of the sea continues if it flow and reflow as in the Thames above the bridge."

(Hale, *De Jure Maris*, ch. iv., Moore, 378; see also Hall, *Foreshore*, p. 13, given in Moore, p. 678.) This definition has been finally adopted into our law, the House of Lords deciding that the average of the medium tides in each quarter of a lunar revolution gives the limit, in absence of all usage, of the rights of the Crown in the seashore, *i.e.* the foreshore (*A.-G. v. Chambers*, 1854, 4 De G., M. & G. 206).

2. *Title to Foreshore.*—The title to foreshore, as has been already indicated, *primâ facie* is in the Crown, but may be shown to be in a subject. To quote Lord Hale again (*De Jure Maris*, ch. vi., Moore, 393, 394):—

This kind of shore (viz. that which is covered by the ordinary flux of the sea) may belong to a subject, . . . not only in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor, . . . or parcel of a village or parish . . . ; it may not only be parcel of a manor, but, *de facto*, it oftentimes is so; and perchance it is parcel almost of all manors as by prescription have royal fish or wrecks of the sea within their manor. So that both wrecks of the sea or royal fish by prescription *infra manerium*, it is a great presumption that the shore is part of the manor as otherwise he could not have them (Hale, *ibid.*, ch. vi., Moore 393, 394).

This *primâ facie* title of the Crown to the foreshore as part of the wastes of the realm not granted out by it is now decisively established by a chain of judicial decisions (Macdonald, C.B., *A.-G. v. Richards*, 1795, 2 Anst. 603; 3 R. R. 632; and *A.-G. v. Parmeter*, 1811, 10 Price, 378; 24 R. R. 723; Holroyd, J., *Blundell v. Caterall*, 1821, 5 Barn. & Ald. 268; 24 R. R. 353; Richards, C.B., *A.-G. v. Burridge*, 1822, 10 Price, 350; 24 R. R. 705; Erle, C.J., *Lestrangle v. Rowe*, 1866, 4 F. & F. 1048; Lord Herschell, *A.-G. v. Emerson*, [1891] App. Cas. 649).

Mr. Stuart Moore, however, in his *History of the Foreshore*, contends that the presumption should be the other way, viz. in favour of the subject's title instead of that of the Crown; and in an exhaustive investigation, beginning with Saxon and Norman charters and grants by the Crown, he establishes the following facts in support of his contention, viz. :—(1) In all grants and confirmations in Saxon times of manors situated upon the seacoast or rivers, the lands granted extended to the shore of the sea, or the midstream of nontidal rivers, or the midstream of tidal rivers *inter fauces terræ* respectively, under such words as "*cum omnibus ad se rite pertinentibus*, the boundaries being often described as "out to the sea," or "to the drawing back of the sea," and the privileges granted with the manor being expressed to be "*in terra et mari*," "on strand and off strand," "on tide and off tide." (2) At the Conquest the Saxon estates were merely regranted to Normans in Domesday Book under the description which they had formerly borne. (3) The Norman grants and confirmations were in the same form as the Saxon ones. (4) The greater number of grants of seacoast manors are lost, but of the remaining ones most are in general terms, and do not convey the shore specifically, though a few made by subjects do. (5) The grants of wrecks, and proceedings with regard to wreck taken against owners of manors, show that the shore was part of the manor. (6) By the end of the reign of King John the Crown had granted out almost every seacoast manor, and by the end of Henry II.'s reign the right to wreck had been granted out in nearly all such manors. (7) There is no instance in any record of the Crown reserving the foreshore to itself in such grants. (8) There is no instance in any record, whether of the Hundred Rolls (1274, Edw. I.), or the *Quo Warranto* Rolls (1278), and the records of the presentment of the justices in eyre under it (which were made for the special purpose of discovering any forfeiture or encroachment by subjects upon the rights of the Crown), of the Crown challenging the right of property in the foreshore in the hands of the subject, or of any encroachment on foreshore where the adjacent manor belonged to a subject; and the only presentments as to foreshore were with reference to encroachments upon the public right of navigation. (9) Till the time of Elizabeth it was the accepted law that all seacoast manors and boroughs extended to low-water mark, whether they were in the hands of the Crown or of a subject. (10) Of the authorities quoted by Hale for his proposition;

one is only an instance of an encroachment by an owner of foreshore upon the public right of navigation in a port (*The Prior of Tynemouth's case*), and the other (*The Wapping case*) was never recognised as law. (11) In the Grand Remonstrance (temp. Charles I.) complaint is made that men's rights are taken away under colour of the king's title to land between high-water and low-water marks. (12) In a return of Crown lands made by the Commissioners of Woods and Forests in 1795 no mention is made of any foreshore or derelict land as being then in the Crown's possession.

In spite, however, of this historical presumption in favour of the subject against the Crown, the law seems to be settled the other way; and "a subject can only establish a title to any part of the foreshore either by proving an express grant thereof from the Crown, or by giving evidence from which such a grant, though not capable of being produced, can be presumed" (Lord Herschell, *A.-G. v. Emerson*, [1891] App. Cas. 649). As has been shown, the former case is the exception, and the latter the rule; but there are several methods by which a subject can make out his title to foreshore in the latter case. He may do so (a) under an ancient grant in general terms, explained by sufficient evidence of modern user or acts of ownership; for modern user may be resorted to for ascertaining the extent of a grant made in general terms (Dallas, C.J., *Chad v. Tilsed*, 1821, 2 B. & B. 403; 23 R. R. 477). Thus it has been held that the foreshore will pass under an ancient grant of "sea-grounds" of a manor where acts of ownership had been exercised over it (*Scrutton v. Brown*, 1824, 4 Barn. & Cress. 485); or under a grant of a manor with all rights, appurtenances, and wastes, wrecks, several fishery (but not *litus maris*), etc., on proof of acts of ownership over it (*Calmady v. Rowe*, 1844, 6 C. B. 861); or under a grant of "terra" (de Gower) under the same conditions (*Duke of Beaufort v. Swansea*, 1849, 3 Ex. Rep. 413); or under the word "ripa" in a grant of a manor described as bounded by "the seashore towards the east," and "the bank (ripa) of the bay of Knockfergus to the east" (*Re Belfust Dock Act*, 1867, L. R. 1 Eq. 128). Under a grant of "waste lands or marish grounds" the foreshore of a tidal river has passed on proof of user (*A.-G. v. Hanmer*, 1858, 4 De G. & J. 200); that of a tidal harbour under a grant of a "town or borough in fee-farm" (*A.-G. v. Portsmouth*, 1877, 25 W. R. 559; 1878, C. A. Moore, 555 ff.). A subject may also make good his title to foreshore by (b) giving sufficient evidence of ancient and modern user, for which a lost grant may be presumed, though no grant exists; and thus, in a case where the *locus in quo* appeared to fall within the terms of the grant by Parliament to the Black Prince of certain manors in Cornwall, it was held that on evidence of acts of ownership by the plaintiff the jury were at liberty to presume a statute granting the land between high-water and low-water marks to a former owner of the plaintiff's manor (*Lopes v. Andrew*, 1826, 3 Moo. & R. 329). Or he may do so (c) by giving evidence of modern user only, which is sufficient to raise the presumption of such a grant (*Ex parte Alston*, 1855, 28 L. T. 337; *Mulholland v. Killen*, 1874, Ir. Rep. 9 Eq. 471); or (d) under a mediæval grant or regrant of lands forfeited or attainted or purchased, granting them *adeo plene*, and referring back to a former grant, supported by evidence of user. Or (e), lastly, title to foreshore may be made by evidence of possession under the Statutes of Limitation (see LIMITATION), or *Nullum Tempus Act* (1623, 21 Jac. I. c. 2; 1768, 9 Geo. III. c. 16), viz. for sixty years, which bars the claim of the Crown against the possession, and perhaps that of any other person against him (Moore, 431, quoting 3 *Inst.* 188 ff. and *Goodtitle v. Baldwin*, 1809, 11 East, 488, 495; 11 R. R. 249).

In the absence of a specific grant, evidence of user or acts of ownership is therefore essential in order to make title to foreshore. No better general definition of the kind or amount of user or acts of ownership necessary for that purpose can be given than the following:—

Every act shown to have been done on any part of the tract by alleged owners or their agents, which was not lawful unless they were owners of that spot on which it was done, is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive; the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being whether the act was such, and so done, that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract, provided there is such a common character of locality as would raise a reasonable inference that if the alleged owners possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession would be had of it, and what the kind of possession proved was.

(Lord Blackburn, *L. A. v. Lord Blantyre*, 1879, 4 App. Cas. 770, 791; and see per Lord Watson, *L. A. v. Young*, 1887, 12 App. Cas. 544, 553.) It is not necessary to show exercise of acts of ownership in every part of a claimed foreshore; if a "common character of locality" be shown, acts of ownership done in one part only are evidence of ownership over the whole locality, provided that that part is continuous with the rest of the foreshore, for substantial possession is enough (*L. A. v. Lord Lovat*, 1880, 5 App. Cas. 288; *A.-G. v. Portsmouth*, 1878, Moore, 555 ff.).

The following are the usual acts of ownership necessary to show title to foreshore:—(a) Taking wreck or royal fish (see FISH, ROYAL) when exercised within a particular manor *infra manerium*, but not if *infra metas* or within certain limits independently of a manor (*Calmady v. Rowe*, above, Moore, 49); (b) the exercise of a several fishery (see FISHERIES), whether by means of weirs and fixed engines on the foreshore (*A.-G. v. Emerson*, [1891] App. Cas. 649)—for "they are the very soil itself" (Hale, ch. v., Moore, 385), being a disturbance of the soil—or without them. Fisheries in tidal waters are generally incident to the soil, and in almost every case are carried on by means of fixed engines (Moore, 725). Where fisheries are granted in seacoast manors by copy of court-roll (as most usually), the strongest presumption arises that the soil of the foreshore is parcel of the manor, for only thus could livery of seisin and rent-service be had for them (Moore, 658). In *Sir Henry Constable's* case (1599, Moore, 236) Popham, C.J., said that weirs two leagues out to sea, leased by copy of court-roll, are evidence of the extent of the manor. A several fishery (whether in tidal or non-tidal waters) is presumptive evidence of the soil going with it, unless the terms in which it is granted clearly convey only the rights of fishing (Bayley, J., *Duke of Somerset v. Foguelli*, 1826, 5 Barn. & Cress. 875, 886, approved by Lord Herschell in *A.-G. v. Emerson*, above). (c) Exercising the right of anchorage and groundage on the foreshore; for "a grant of anchorage groundage and wreck, or either of them, is some evidence that the soil between high and low water marks was intended to pass" (Erle, C.J., *Lestrangle v. Rowe*, 1866, 4 F. & F. 1048); but these are as much port dues as soil dues, and may be evidence only of having the franchise of a port (Moore, 555, 689). (d) Ballastage or dues taken for ballast put on wharves or quays built on the foreshore. (e) Erecting wharves, piers, etc., on the foreshore (*Lestrangle v. Rowe*, above). (f) "Constant and usual fetching of gravel and seaweed and sea sand between high and low water marks, and licensing others so to do" (Hale, *De Jure Maris*, ch. vi., Moore, 394; *Calmady v. Rowe*, 1844, 7 C. B. 861; *Healy v. Thorne*, 1870, Ir. Rep. 4 C. L. 495);

but if these acts are done by the public (trespassing), long practice of so doing must be proved in order to destroy the proprietor's title. (g) "Enclosing and embanking against the sea, and enjoyment of what is so inned" (Hale, *ibid.*, Moore, 304; *Chad v. Tilsed*, 1821, 2 B. & B. 403). (h) Presentments and punishments for purprestures or encroachments on the shore in the courts of the manor, or convictions in public Courts (Hale, *ibid.*; *Wyse v. Leahy*, 1875, Ir. Rep. 4 C. L. 384; *Brew v. Haren*, 1874, Ir. Rep. 9 Ch. 29). (i) Payment of tithes and rates for fisheries upon an arm or shore of the sea; for rateability before 1874 shows that the fishery was incident to the soil (*R. v. Ellis*, 1813, 1 M. & S. 652; 1874, 37 & 38 Vict. c. 54, s. 3). (j) Erecting groins or jetties to protect land from the sea (*Lestrange v. Rowe*, above), though this is equivocal evidence, being attributable to the common-law right of the subject to protect himself from the sea, whether his means of doing so injure his neighbour or not (*R. v. Pagham*, 1828, 8 Barn. & Cress. 355). Hale also quotes as "evidence of the shore being parcel of a manor, vill, or parish, usual perambulations, common reputation, known metes and divisions, and the like" (ch. vi., Moore, 394).

In this connection it may be observed that in the case of a parish abutting on the sea or a tidal water the *prima facie* presumption is that the foreshore is extra-parochial (*R. v. Musson*, 1858, 8 El. & Bl. 900); though this presumption may be rebutted by evidence of perambulations and the like (*Ipswich Dock Commissioners v. St. Peters*, 1866, 7 B. & S. 310; *Bridgewater Trustees v. Bootle*, *ibid.* 348, where the decision in *McCann v. Sinclair*, 1859, 2 El. & El. 53, is explained in the same way). Where a parish is bounded by the seashore, the part of the shore which lies between high-water mark of ordinary spring tides and that of medium tides is within the parish (*R. v. Gee*, 1860, 1 El. & El. 1868, following *A.-G. v. Chambers*, *ante*). The part of the seashore which lies between high and low water marks belongs to the adjoining county, and it has been held that its justices and not the Admiralty have jurisdiction over it, whether, when the offence was committed, the place was covered with water or not (*Embleton v. Brown*, 1860, 3 El. & El. 234). Perches or oyster layings on the foreshore of a parish may be not extra-parochial, but liable to tithe by custom; and the fact of their never having been so rated does not countervail the presumption of parochiality shown by perambulations of the parish and payment of tithes for sixty years without dispute (*Perrott v. Bryant*, 1836, 2 Y. & C. Ex. 61). A further illustration of foreshore being considered as part of adjacent land is afforded by the settlement of the dispute between the Crown and the Duchy of Cornwall with regard to minerals under the foreshores and sea round Cornwall, by Act of Parliament, on the basis that the mines under the foreshore should be the property of the Duchy, and those under the sea that of the Crown (1858, 21 & 22 Vict. c. 109); and by a later agreement those under the estuaries *inter fauces terre* were given to the Duchy. The presumption that the seashore between high and low water marks belongs to the Crown also extends to Wales (*A.-G. v. Jones*, 1863, 2 H. & C. 347).

The English law as to foreshore applies in India; and the Indian Government have the freehold in the bed of the navigable rivers there and land between high and low water mark (*East India Co. case*, 1856, 10 Moo. P. C. 140).

3. *Rights and Liabilities in respect of Foreshore.*—The right of property in the foreshore, whether it be in the Crown or in a subject, is subject to the obligation of allowing the owner or occupier of land adjoining the sea free access or egress to and from the sea from and to his land, and to beach, land, and haul up boats upon the shore (*A.-G. v. Wemyss*

1888, 13 App. Cas. 192 P. C.); and also that of allowing the public to navigate over the foreshore and anchor there either by an anchor or by a fixed mooring, if immemorial user to that effect be shown (*A.-G. v. Wright*, [1897] 2 Q. B. 318); and fish unless the Crown by grant prior to Magna Carta has granted a several fishery to an individual, or by immemorial custom or prescription would be presumed to have done so, when the public right of fishing is excluded; but the *prima facie* presumption is that fishing in tidal waters is common to all (*Mayor of Orford v. Richardson*, 1791, 4 T. R. 437; *Chad v. Tilsott*, 1821, 2 B. & B. 403). This right of fishing extends to taking fish found on the seashore between high and low water marks (*Bagot v. Orr*, 1801, 2 Bos. & Pul. 472); but it does not include, unless a particular custom or prescription to that effect (*Gray v. Bond*, 1821, 5 Moore, Ex. 527), or a justifying peril or necessity (*Wade v. Cresswell*, 1741, Willes, 265) be proved, the right for fishermen to use the foreshore or the soil above it for approaching to or retiring from their boats, or carrying fish to and fro, or for landing and drawing up boats and leaving them there for future use, or lading or unlading fish and other goods at all times, and not merely under pressure of peril or necessity (*Holroyd, J., Blundell v. Caterall*, 1821, 5 Barn. & Ald. 268; 24 R. R. 353; *Kekewich, J., Earl of Ilchester v. Rashleigh*, 1889, 5 T. L. R. 739). The owner of foreshore may also fish there with fixed engines, though he has not a several fishery; while the public can only fish with net, line, or rod (see FISHERIES).

This *jus publicum* or public right of access over the foreshore for the purposes of navigation and fishery does not give the public the right to use the foreshore for other purposes, viz. gathering seaweed between high and low water mark (*Howe v. Stawell*, 1833 (Ir.), Al. & Nap. 348; *Healy v. Thorne*, 1870, Ir. R. 4 C. L. 495); and though seaweed cast on a private shore between high and low water marks is not the subject of larceny (*R. v. Clinton*, 1869, Ir. R. 4 C. L. 6), trover will lie for it (*Brew v. Haren*, 1874, Ir. R. 9 C. L. 29). The public have no right to take fish-shells on the foreshore (*Bagot v. Orr*, 1801, 3 Bos. & Pul. 472); or gravel, or sand, or stones from there (*Scrutton v. Brown*, 1824, 4 Barn. & Cress. 485), nor to cross the foreshore either on foot or in bathing-machines for the purpose of bathing in the sea, except by a particular custom, though if they can get there they can bathe there (*Blundell v. Caterall*, 1821, 5 Barn. & Ald. 268; 24 R. R. 353; *Mace v. Philcox*, 1864, 15 C. B. N. S. 600); though a tenant under a building agreement with the lord of the manor, who has only a right of entry upon the foreshore for the purposes of that agreement, cannot maintain an action against a defendant who sets up a forty years' uninterrupted use and enjoyment of the foreshore by taking shingle thence and putting bathing-machines thereon (*Laird v. Briggs*, 1881, 19 Ch. D. 22). A custom for the public or the inhabitants of a township to take stones, sand, or seaweed from the shore is bad as a custom for a *profit a prendre in alieno solo* (*Constable v. Nicholson*, 1863, 14 C. B. N. S. 230, and 11 W. R. 698; *Maonamar v. Higgins*, 1854, 4 Ir. C. L. R. 326). Such acts by the public, though of the nature of ownership, unless continued for a considerable time, will not prevail against counter acts of ownership by the lord of the manor, who holds it under a grant of the manor with "fisheries, fishings, wrecks of the sea, and all other rights, jurisdictions, franchises, liberties, privileges, profits, and commodities" (*A.-G. v. Jones*, 1863, 2 H. & C. 347); nor, unless they are done by persons licensed by the Crown are they acts of adverse possession by the Crown, which can be set up against the person claiming the property in the foreshore; or unless, though done without such licence, they amount to such an encroachment as to deprive the possession of the

riparian owner of that exclusive character which is necessary in order to establish a prescriptive right, and provided that in either case they are known or should be known to the riparian owner (*L.-A. v. Young*, 1887, 12 App. Cas. 544, Lord Watson; see *Hastings v. Ivall*, 1874, L. R. 19 Eq. 558; also *Irish A.-G. v. Hamilton*, 1880, L. R. Ir. 5 C. L. 555; and *Daly v. Murray*, 1885, L. R. Ir. 17, 185).

On the other hand, the owner of foreshore who proves his right to wreck, though it is not mentioned in his grant of the manor, unless he can prove acts of ownership, cannot prevent the public from digging sand or stones on the foreshore (*Dickens v. Shaw*, 1822, Moore, 451); nor can he claim as wreck a vessel, though lying within the low-water mark and within the manor, if she is still surrounded by water when he takes possession of her, and is boarded by officers of the Admiralty at the same time; for she is then a droit of Admiralty (*The Pauline*, 1845, 2 Rob. C. 359).

A lord of a manor cannot establish an exclusive right to cut seaweed on rocks situate below low-water mark, except by grant from the Crown or long-undisturbed enjoyment giving title by prescription (*Benest v. Pipon*, 1829, 1 Kn. P. C. 60, a Jersey case). In the counties of Devon and Cornwall the inhabitants are specially allowed by statute to take sand from the seashore under the full seamark, but must pay customary dues for landing it (1609, 7 Jac. I. 18).

A foreshore owner may not dig away the soil of the foreshore in such a way as to expose the adjoining land to the inroads of the sea, for it is a public duty incumbent on the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers or raising artificial barriers; and no subject may destroy a natural barrier against the sea (*A.-G. v. Tomline*, 1880, 12 Ch. D. 214, and 14 *ibid.* 48). But he is under no obligation to protect his neighbour, if the foreshore is washed away by the sea (*Hudson v. Tabor*, 1877, 2 Q. B. D. 290), and thus in the late Master of the Rolls' words in *Tomline's* case, "although he is not bound to keep the sea out, he must not do an act which will let the sea in" (14 Ch. D. 65). Nor is he allowed to take shingle from the shores of ports, harbours, or havens (1814, 54 Geo. III. 159, s. 14); and the word "ports" is here used in its wide sense of ports as appointed by the Treasury for customs and fiscal purposes (*Nicholson v. Williams*, 1871, L. R. 6 Q. B. 652). In the river Thames, in its tidal portion, no person other than the conservators and their agents can dredge or raise any gravel, sand, ballast, or other substance from the "bed" of the river except with the licence of the conservators; and it has been held that the word "bed" in the tidal portion of the river means the soil between the ordinary high-water mark on one side and the ordinary high-water mark on the other, and that the right of the owner of the soil to take gravel, etc., between high and low water mark is not preserved, though no compensation is made to him (*Thames Conservators v. Smeed*, [1897] 2 Q. B. 334, overruling *Pearce v. Bunting*, [1896] 2 Q. B. 360). The liabilities of a foreshore owner may, however, be limited like his powers; and if he is only owner for purposes of navigation, he is not the owner for sanitary purposes, and so liable to abate a nuisance there not caused by his fault (*London Port Sanitary Authority v. Thames Conservancy*, [1894] 1 Q. B. 647).

4. *Accretion and Encroachment upon Foreshore.*—The limits of the foreshore from the nature of the case are not permanent, for the high and low water marks may vary by the sea gaining on the land by encroachment, or the land gaining on the sea by accretion or alluvion (*q.v.*). Very few ancient grants of manors contain words expressly giving the shore with its accretions, such as *totum litus cum pertinentiis*

et cum accrescentiis, or a manor *cum maritimis incrementis*; in which case the owner of the adjoining land is clearly entitled to accretions to the shore. The greater part only in terms convey the manor with its appurtenances or some such general words; and in this latter case it is the recognised rule at common law that accretions, if gradual and imperceptible in formation, belong to the owner of the adjacent lands (*Abbot of Peterborough's case*, 1367, *Abbot of Ramsey's case*, 1369, Moore, 157-8; *R. v. Lord Yarborough*, 1828, 5 Bing. 163; Callis on *Sewers* (1622), quoted by Moore, 255); but if sudden and perceptible (so that the shore is *relicted*, to use the technical term as opposed to *projected*, as it is by alluvion), they belong to the Crown (*R. v. Oldsworth*, 1637, Car. 1.; Moore, 292); and in *A.-G. v. Reeve*, 1885, 1 T. L. R. 675, it was held that accretions of land to the seashore which are perceptible by marks and measures as they take place belong to the Crown, and not to the lord of the manor; but in this case the latter did not claim the foreshore. It has also been said that this doctrine of accretion may not apply where the boundaries of foreshore are defined and known, so that the accretions are easily perceptible (Lord Chelmsford, *A.-G. v. Chambers*, 1858, 4 De G. & J. 55, 71); but in a very recent case the present Master of the Rolls (then Lindley, L.J.) expressed himself as not satisfied that this rule applies to cases of land having no boundary next flowing water except the water itself (*Hindson v. Ashby*, [1896] 2 Ch. 1, 13; and so *Foster v. Wright*, 1878, 4 C. P. D. 438); and the same view is favoured in another earlier case (Bayley, J., *Scrutton v. Brown*, 1825, 4 Barn. & Cress. 485, 498). It seems, accordingly, that so long as the accretion is gradual and imperceptible, ("imperceptible" meaning "imperceptible in manner of accretion, not imperceptible after long lapse of time," per Lord Hale, so explained by Lord Tenterden, *R. v. Lord Yarborough*, *ante*), whether the foreshore has boundaries or not, if these are not of a permanent kind, *e.g.* a sea-wall, these accretions belong to the adjoining landowner. In the converse case, *i.e.* of gradual encroachment by the sea upon the land, the same principle applies, and the Crown takes the benefit (*In re Hull and Selby R. Co.*, 1839, 5 Mee. & W. 327); while, if such encroachment be sudden and violent, the subject does not lose his property, even though the land be overflowed by the sea forty years, if he can still identify the extent of the property (Hale, ch. iv.; Moore, 381).

Where the change in the boundary of the foreshore is due to artificial causes, *e.g.* by accumulation of materials for mining, or other operations on land bordering on the sea or an arm of the sea, the opinion has been expressed that if such artificially caused accretion arises from a fair use of the land adjoining the seashore, and not from acts done in order to acquire the shore, it shall be governed by the same rule as a naturally caused accretion (Lord Chelmsford, *A.-G. v. Chambers*, 1859, 4 De G. & J. 55, 64-69).

Where the Crown seeks to recover lands alleged to have been reclaimed from the sea by encroachment or purpresture, and the defendant disputes the Crown's title to the soil between the *present* high and low water marks, the Court will direct an issue to try that point before inquiring into the *old* boundaries; while, if the defendant admits the Crown's title to the soil between the present high and low water marks, the burden is cast upon the Crown of proving that the high-water mark formerly extended further than it does, at the present time (*A.-G. v. Chamberlaine*, 1858, 4 Kay & J. 292).

5. *Management and Procedure*.—The duty of administering the interests

of the Crown in the foreshores of the kingdom belongs for the most part to the Board of Trade (see BOARD OF TRADE), all the authority of the Commissioners of Woods and Forests (who had had that duty since 1830) having been transferred to the Board in 1866, with the exception of the foreshores in the Thames (see THAMES), Tees, and Durham, and those fronting and adjacent to Crown lands, and the mines under the foreshores (29 & 30 Vict. c. 62, ss. 7, 20, and 21, schedule). In 1845 the Commissioners had been empowered to lease foreshores on derelict lands for ninety-nine years (8 & 9 Vict. c. 99); and by later Acts to compromise the Crown's disputed claims with the consent of the Treasury (1853, 16 & 17 Vict. c. 56, s. 5); and the Board has the powers formerly enjoyed by the Admiralty of preventing ballast and shingle being taken from the shore of ports (*Nicholson v. Williams*, ante, 1862, 25 & 26 Vict. c. 69). By the Crown Lands Act of 1885 (48 & 49 Vict. c. 79) the Commissioners and the Board have the power to lease foreshores for fisheries for sixty years.

The ordinary procedure in questions of title to foreshore between the Crown and a subject is to bring the question before the Court by English information (see INFORMATIONS); and it is then a matter for the discretion of the Court whether it will try the question itself, or direct an issue before a jury. Such informations were formerly exhibited in the Court of Exchequer on its equity side, which had the power to send any questions that might arise upon the title to a trial at law; and the opinion was strongly expressed that where a legal title arose trial by jury was necessary to determine it, in view of the Statute 21 Jac. I. c. 14, which allowed a subject who had had possession for twenty years to plead the general issue in informations of intrusion brought by the Crown, and to retain possession till trial (*Wood, B., A.-G. of Prince of Wales v. St. Aubyn*, 1811, Wight. 167; 12 R. R. 718 n). In every case where a question of fact arose, the Court directed an issue, except in *A.-G. v. Richards* (1795, 2 Anst. 607: 3 R. R. 632; and see *Moore*, 626). The jurisdiction passed from the Exchequer Court to the Exchequer Division, and thence to the Queen's Bench Division; and it is not touched by the Judicature Acts (Order 72; *A.-G. v. Emerson*, 1882, 10 Q. B. D. 191), nor by the Crown Suits Acts, 1855–1865 (18 & 19 Vict. c. 90; 24 & 25 Vict. c. 62; 28 & 29 Vict. c. 104: *A.-G. v. Newcastle-upon-Tyne*, [1897] 2 Q. B. 384); and the Crown has the same right as formerly to have any question affecting its rights decided in that Division only (*A.-G. v. Constable*, 1879, 4 Ex. D. 172, where a case by a lord of a manor against trespassers was removed from the Chancery to the Exchequer Division). For further details, see EXCHEQUER PRACTICE.

[*Authorities*.—*Moore, History of the Foreshore*; and *Hale, De Jure Maris* and *First Treatise*, and *Hall, Seashore*, therein contained.]

Forest; Forest Law.—In law, a forest is not merely a tract of wood and pasture, but a tract of wood and pasture appropriated to a particular purpose, and subject not to the ordinary law or Courts, but to special laws and Courts. According to Manwood (the great authority on the subject), “a forest is a certaine territorie of woody grounds and fruitful pastures, priviledged for wilde beasts and fowles of forest, chase, and warren, to rest and abide in, in the safe protection of the king for his princely delight and pleasure, which territorie of ground so priviledged is meered, and bounded with unremovable markes, meeres, and boundaries either known by matter of record or else by prescription: And also replenished with wilde beasts

of venerie or chase, and with great coverts of vert for the succour of the said wilde beasts to have their abode in: For the preservation and continuance of which said place, together with the vert and venison, there are certaine particular lawes, priviledges, and officers belonging to the same meete for that purpose that are only proper unto a forest and not to any other place."

The king alone could make a forest, and not only of his own lands, woods, and wastes, but he could afforest the lands of his subject.

- The way of making a forest is this. Certain commissioners are appointed under the Great Seal of England, who view the ground intended for a forest, and fence it round with metes and bounds, which, being returned to the Chancery, the king causes it to be proclaimed throughout the county where the land layeth that it is a forest, and to be governed by the laws of the forest, and prohibits all persons from hunting there without his leave, and then he appointeth officers fit for the preservation of the vert and venison, and so it becomes a forest on record (4 *Inst.* 300).

This right of the king to reserve wild beasts and game and to make a forest for them is treated by Manwood as a royal prerogative, and likened to the king's prerogative in gold and silver, which, by reason of their excellency, belong to the king on whosoever land they are found; so wild beasts of venerie and beasts and fowls of chase and warren most properly belong to the king.

The oppressive character of this claim to afforest lands of a subject, and thereby make them subject to special laws, under which the owner could cut no trees on his lands, and the killing of a beast of the forest was punished by loss of life or member, led to the *Charta de foresta* (25 Edw. I.), under which all forests made by Henry II., Richard I., and John, unless made on the demesne lands of the king, were disafforested (*q.v.*), and offences against the forest laws were no longer to be punished by death or loss of member.

Vert is every kind of tree that doth grow in a forest, both great wood and underwood. *Venison* includes every beast of forest and chase. *Beasts of the forest* are the hart, the hind, the hare, the boar, and the wolf. *Beasts of the chase* are the buck, the doe, the fox, the martrou, and the roe. *Beasts and birds of warren* are the hare, the coney, the pheasant, and the partridge.

Forests are of such antiquity that in Manwood's time there was no record of the making or beginning of any forest save only the New Forest, made by the Conqueror, and the Forest of Hampton Court, created by virtue of 31 Hen. VIII. c. 5.

Within a forest are two classes of rights, which are antagonistic—the forestal rights of the Crown and rights of common in the subject. The forestal rights were extensive—no one could hunt or hawk, even on his own lands, within the ambit of the forest, without the king's authority; and a man could not cut wood on his own land or destroy the coverts without licence of the justice in eyre, as well as a view of the forester. To this day the Crown has forestal rights over private lands within Dean Forest and the New Forest.

Rights of common in a forest are of a limited nature. The right can only be exercised in respect of beasts which are commonable in a forest, and geese, goats, sheep, and swine are not so commonable. A right for such uncommonable animals cannot be gained by prescription, for their presence in a forest is a nuisance, and such a nuisance cannot be prescribed for. The right of common is also restricted to certain portions of the year, for

there is no commoning during the fence month (fifteen days before and fifteen days after midsummer day, old style), and in New Forest and DEAN FOREST cattle were also excluded during the winter heyning, that is, from the 11th November to the 23rd April (old style). Further, the forestal rights are paramount, and the commoners can only take what is left after the king's beasts are provided for. If a commoner puts in so many cattle that there is not sufficient feed for the king's beasts, he is accounted a surcharger; but there is no limit to the number of beasts of the forest that the king may have.

The origin of rights of common in a forest is not very clear. Manwood states that they were a recompense for the burden of the forest laws, and the facts, so far as known, are consistent with this view.

Offences against the Forest.—Every offence against the forest laws is comprehended in the term "nuisance of the forest," of which there were three sorts:—(1) Common nuisance, such as neglect to repair a highway, commoning by persons having no rights, damming of rivers and streams; (2) special nuisance, which specially affected the beasts of the forests, as unlawful killing or hunting; (3) general nuisance included all manner of trespasses tending to the waste, hurt, or destruction of the vert of the forest, such as surcharging, waste, assarts, and purprestures.

Surcharging is commoning with more beasts than those for which a man is entitled to common, or with so many that there is not left sufficient feed for the deer. *Waste* is the cutting down of vert without the licence of the Chief-Justice in Eyre and the view of the forester, even though it grew on a man's own land. *Assart* was the conversion of wood into arable land, or the routing up of the vert by the root; and if done on a man's own land was punishable by a fine; if on the king's land, by a double fine and imprisonment. *Purpresture* is any manner of encroachment upon the forest, whether in building, enclosure (whereby the area of the forest is diminished), or by using any liberty or privilege without lawful warrant.

A *chase* is a franchise to keep beasts of chase in a certain defined but unenclosed territory, with the exclusive right of hunting them therein. It is next in degree to a forest, but has no laws peculiar to it, and all offences within it are punished by the common law and not by the forest laws.

A *park* is an enclosed chase and is next in degree to chase.

A *free warren* is a liberty and franchise to keep and preserve beasts and birds of warren. The owner thereof has a property in such beasts and birds, and a right to exclude all other persons from taking them.

Forest Courts.—The Courts of the forest were three:

I. *Court of Attachments*—the lowest of the three—held before the verderers every forty days.—This Court exercised no judicial authority if the value of the trespass was 4d. or more. It could only inquire, and not convict. It received the attachments presented by the foresters, and enrolled them for the next Court of Swainmote. Attachments were of three kinds—*First*, by goods and chattels, where a forester, on hearing of any offence against the nether vert (underwood), attached the goods and chattels of the offender, and called on the offender to find pledges to appear at the next Court of Attachments. If the offender failed to appear, his goods were forfeited. If he appeared, and gave pledges or sureties to answer the offence at the next justice seat, his goods were redelivered to him. *Second*, by body, pledges, and mainprise. Where the offender was taken red-handed trespassing in vert, he might be attached in his body, and caused to find two pledges to answer the offence at the next Court of Attachments, and on his appearance there, to be mainprised until the coming of the Lord Justice

in Eyre. *Third*, attachment by the body only without any pledges or main-prise applicable in cases of repealed trespasses to vert or trespass to venison.

II. *Court of Swainmote*.—Held thrice a year before the verderers, and all the forest officers and the freeholders of the forest were bound to appear there. A jury of freeholders was sworn, to whom the presentments were delivered to be inquired into. If the jury found the presentment true, the offender stood convicted, but the Court could not give judgment; that was reserved to the Court of Justice Seat. The Court of Swainmote was also charged with inquiring into the conduct of forest officers.

III. *Court of Justice Seat*.—A Court of record held once in three years by one of the lords chief justices of the forest. All the freeholders of the forest were summoned to this Court; all presentments and indictments enrolled by the verderers had to be presented to the chief justice for judgment. This Court had also a general jurisdiction over all offences committed within the forest, whether against the forest law or not.

The chief officers of the forest were the *justices in eyre*, one for the forests on this side Trent, and the other beyond. *Verderers*, judicial officers of the king's forest, chosen by force of the king's writ by the freeholders of the county, and sworn to maintain and keep the assizes of the forest. *Chief warden*, who bailed and discharged offenders, and summoned the forest officers and others to the justice seat. His duties were mainly executive. *Regarder*, a ministerial officer, sworn to make the ancient regard of the forest, and to view and inquire of all offences within the forest in vert or venison. *Forester*, an officer sworn to preserve the vert and venison within his bailiwick, and to attach and present offenders. *Agister*, appointed to superintend the taking in cattle or swine to pasture or pawnage of the king's demesne lands and woods.

SPECIAL ENACTMENTS RELATING TO ROYAL FORESTS.

- Alice Holt*, 52 Geo. III. c. 72; 18 & 19 Vict. c. 16.
Bere, 50 Geo. III. c. 238 (Local).
Brecknock, 55 Geo. III. c. 190; 58 Geo. III. c. 99.
Dean, 20 Chas. II. c. 3; 48 Geo. III. c. 72; 59 Geo. III. c. 86; 6 & 7 Will. IV. c. 3; 1 & 2 Vict. c. 42; 1 & 2 Vict. c. 43; 5 & 6 Vict. c. 48; 5 & 6 Vict. c. 65; 8 & 9 Vict. c. 118, s. 13; 18 & 19 Vict. c. 16; 24 & 25 Vict. c. 40; 29 & 30 Vict. c. 62; 29 & 30 Vict. c. 70; 33 Vict. c. 8; 34 & 35 Vict. c. 85.
Delamere, 18 & 19 Vict. c. 16; 19 & 20 Vict. c. 13; 29 & 30 Vict. c. 62, s. 6.
Epping, 34 & 35 Vict. c. 93; 35 & 36 Vict. c. 95; 38 & 39 Vict. c. 6; 39 & 40 Vict. c. 3.
Exmoor, 55 Geo. III. c. 138.
Hainault, 14 & 15 Vict. c. 43; 21 & 22 Vict. c. 37.
New, 9 & 10 Will. III. c. 36; 39 & 40 Geo. III. c. 86; 41 Geo. III. (U.K.) c. 108; 48 Geo. III. c. 72; 50 Geo. III. c. 116; 59 Geo. III. c. 86; 12 & 13 Vict. c. 81; 14 & 15 Vict. c. 76; 15 & 16 Vict. c. 62, s. 9; 17 & 18 Vict. c. 49; 29 & 30 Vict. c. 62; 29 & 30 Vict. c. 66; 40 & 41 Vict. c. 121 (Local); 42 & 43 Vict. c. 194 (Local).
Parkhurst, 52 Geo. III. c. 171 (Local).
Salcey, 6 Geo. IV. c. 132; 18 & 19 Vict. c. 16.
Sherwood, 58 Geo. III. c. 100.
Silton, 5 Geo. IV. c. 99.
Waltham (see Epping), 12 & 13 Vict. c. 81.
Whitchwood, 16 & 17 Vict. c. 36; 19 & 20 Vict. c. 32.
Whittlewood, 53 Geo. III. c. 158; 5 Geo. IV. c. 99; 16 & 17 Vict. c. 42; 18 & 19 Vict. c. 16.
Windsor, 53 Geo. III. c. 158; 55 Geo. III. c. 122; 56 Geo. III. c. 132.
Woolmer, 52 Geo. III. c. 71; 18 & 19 Vict. c. 16; 18 & 19 Vict. c. 46.

[*Authorities*.—*Manwood's Forest Law*; *Coke's Fourth Institute*; *Charter of the Forest*, 25 Edw. I.; 34 Edw. I.; 7 Hen. IV. c. 1; 4 Hen. v. stat. 2, c. 1.]

Forestalling.—The offence of buying up goods on their way to market or inducing the owners not to take them to market, if done with a view to enhance prices or evade market tolls (see (1374) 5 Seld. Soc. Publ. 62). It was abolished by 7 & 8 Vict. c. 24. See 2 Pollock & Maitland, *Hist. Eng. Law*, 467 n; 3 Steph. *Hist. Cr. Law*, 199; and ENGROSSING.

Forfeit.—The word “forfeit” means not merely that which is actually taken from a man by reason of some breach of condition, but includes also that which becomes liable to be so taken (per Kay, J., *In re Levy's Trusts*, 1885, 30 Ch. D. at p. 125, and see the whole judgment in that case). See also Stroud, *Jud. Dict.*, s.v. “Forfeit”; and next article.

Forfeit; Forfeiture (*Forisfacere; Forisfactura*).—1. These terms, in their original sense in the common law, applied to the transfer to the Crown or his immediate feudal superior of the lands and goods of a traitor or felon on his conviction and attainder, or of the goods of a person who fled from justice in respect of a capital felony or petty larceny, even if he were acquitted. There were numerous other forfeitures of this class (enumerated 2 Burn, *Justice*, 17th ed., 302, 303), including forfeiture of the goods of a person against whom a verdict of *felo de se* is returned. All these forfeitures, after a gradual relaxation of the law, were finally abolished in 1870 (33 & 34 Vict. c. 23); and forfeiture as a common law punishment now continues only in the case of the virtually defunct procedure in OUTLAWRY (*q.v.*). The bulk, if not the whole, of the mass of enactments indexed under tit. “Forfeiture” in the official index to the statutes, if still in force, apply now only to outlawry. The term does not extend to forfeited recognisances (*In re Nottingham*, [1897] 2 Q. B. 502).

2. Forfeitures of war belong to the Crown under 34 Edw. III. c. 12; hereon see PRIZE.

3. The term forfeiture is also applied as between landlord and tenant in respect of the liability to forfeit a chattel interest in land for waste or breach of covenant. See LANDLORD AND TENANT.

4. It has long been the practice in statutes to use the word “forfeiture” as equivalent to “penalty” or “specific pecuniary sum,” payment of which is ordered on a conviction or adjudication either in a criminal proceeding properly so called, or in a penal action. Forfeitures of this kind are not affected by the Act of 1870 (33 & 34 Vict. c. 23, s. 5). See FINE; PENAL ACTION; PENALTY.

In the absence of express words, statutes of this kind do not bind the Crown (*R. v. Kent Justices*, 1890, 24 Q. B. D. 181); but the forfeitures created enure to the benefit of the Crown, unless the statute gives another destination (*Bradlaugh v. Clarke*, 1882, 8 App. Cas. 358).

5. Power is given under Acts affecting the revenue and other branches of law to seize and forfeit goods or implements with respect to which or with which the law is being broken. See CUSTOMS; EXCISE; FISHERIES.

The property forfeited is divested on the commission or proof of the offence (*The Annandale*, 1867, 2 P. D. 219).

6. All forfeitures, whether created by common law or statute, are regarded as so far of a penal character that the civil Courts will not permit discovery by interrogatories or of documents to be obtained in aid of the person seeking to enforce them, whether he is a common informer or not.

This has been decided as to concealing the goods of tenants contrary to 11 Geo. II. c. 29, pound-breach (*Jones v. Jones*, 1888, 22 Q. B. D. 428; *Hobbs v. Hudson*, 1890, 25 Q. B. D. 232).

As to civil proceedings for penalties under the Copyright Acts, see *Saunders v. Wiel*, No. 1, [1892] 2 Q. B. 18, 321; and as to actions to enforce forfeitures under a lease, *Earl of Mexborough v. Whitwood Urban District Council*, [1897] 2 Q. B. 111; as to offences and by the Rivers Pollution Act, 1876, see *Derby Corporation v. Derbyshire County Council*, [1897] App. Cas. 550.

[*Authorities*.—Burn, *Justice*, 30th ed., “Fines and Forfeitures”; Bac. Abr. tit. “Forfeiture”; Com. Dig. *ibid.*; Vin. Abr. *ibid.*]

Forged Transfer.—In *Barton v. London and N.-W. Ry. Co.*, 1888, 38 Ch. D. 144, a question arose as to the effect on the registered holders of stock in a company of a forged transfer of such stock registered in the books of the company. In the result the company had to make good to the original holder the shares thus transferred, and to indemnify the *bona fide* transferee (S. C., 1890, 24 Q. B. D. 77; and see *Tomkinson v. Balkis Consolidated Co.*, [1893] App. Cas. 396). In consequence of this state of the law were passed the Forged Transfer Acts of 1891 (54 & 55 Vict. c. 43) and 1892 (55 & 56 Vict. c. 36). These Acts, when adopted by resolution, permit the making of compensation by payment in cash (instead of the issue of stock, etc.) for loss sustained through a forged transfer, or transfer under a forged power of attorney, of any shares, stock, or securities transferable by written instrument, or by entry in any book or register where such shares, etc., are so transferable and are lawfully issued—

(1) By a company incorporated by royal charter, or by or under any general or local statute of the British Parliament;

(2) By a county or town council, or any local authority in the United Kingdom, which has power to levy or require the levy of a rate, the proceeds of which are applicable to public purposes;

(3) By industrial, provident, friendly, benefit, building, or loan societies incorporated by or under statute (Act of 1891, s. 3);

(4) By harbour authorities and conservancy authorities (1892, s. 4);

(5) In the case of colonial stock inscribed under 40 & 41 Vict. c. 59, if the Colonial Government adopts the Act of 1891 (s. 5).

The compensation may be paid whether the loss was sustained before or after August 5, 1891 (Act 1892, s. 1), and may be paid by a company, etc., to which the shares, etc., have passed from the original company, etc., by amalgamation or otherwise (1892, s. 2).

Borrowing powers are given for the purpose of raising the necessary amount of compensation (1891, s. 1 (3)), and an insurance fund may be created by charging transfer fees not exceeding 1s. per £100, and, not less than 3d., or by insurance accumulations of income or otherwise (1891, s. 1 (2); 1892, s. 3). This scheme corresponds to the insurance fund created by the Land Transfer Acts of Australasia (*Gibbs v. Messer*, [1891] App. Cas. 248), proposed by secs. 7, 21 of the English Land Transfer Act, 1897 (60 & 61 Vict. c. 65). See *Palmer, Company Precedents*, 6th ed., vol. i. pp. 318, 323, 550, 581.

Reasonable restrictions on transfer may be imposed with a view to guard against loss by forgery (1891, s. 1 (4)). This as to joint-stock companies is at times increased by giving directors power to veto transfers (32 L. J. 393; and see COMPANY, vol. iii. p. 198). The company, etc., on

paying compensation are subrogated to all civil rights and remedies of the injured person against any other person in respect of the forgery (1891, s. 1 (5)). There has been a good deal of colonial legislation on the lines of the Imperial Acts.

Forgery.

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HISTORY OF THE OFFENCE.—The position of forgery at common law is somewhat anomalous. Bracton, who describes it by its Roman name, *crimen falsi*, deals with only two of what he terms its multiplex aspects, viz. forging the king's seal, i.e. its impression (1 Hale, P. C., 182), or sealing therewith charters or writs or affixing thereto adulterine seals. This offence amounted to high treason (*de Coronâ*, ff 118 b, 119 b). It was recognised as such by the Treason Act, 1351, and continued so until 1861 (see 11 Geo. IV. and 1 Will. IV. c. 66, s. 1; 24 & 25 Vict. c. 98, s. 1). But other forms of the offence Bracton does not name, nor does it appear that the common law Courts often punished it except in those cases, or dealt with it except on issues raised in civil cases (2 Pollock and Maitland, *Hist. Eng. Law*, 503, 538), though no doubt combination to fabricate false written evidence could be dealt with as CONSPIRACY.

The fact that a petition was made in Chancery for relief against forged documents indicates the inadequacy of the Courts to afford even a civil remedy against fraud by forgery (10 Seld. Soc. Publ. No. 85), which is confirmed by the passing in 1413 of a statute (1 Hen. v. c. 3) by which the forgery of deeds was made the subject of civil action, and the offender was also subjected to fine and ransom at the king's will (3 Steph. *Hist. Crim. Law*, 181).

Forgeries not punishable as treason and not within this Act, when they related to writings which could be put in evidence, were treated as a Star Chamber matter until 1562, when forgery was first really made a statutory crime (5 Eliz. c. 14); and even up till the suppression of the Star Chamber that Court took cognisance of forgeries for which there was no recognised remedy at law (Star Chamber Reports, ed. Gardiner; Camden Soc. Publ. pp. 40, 73, 79).

Subsequently forgery of bills of exchange and certain other mercantile documents was punished by 2 Geo. II. c. 25; 7 Geo. II. c. 22; and 18 Geo. III. c. 18, and especially during the eighteenth century a multiplicity of enactments made it felony to forge certain specified documents (Burn, *Justice*, 17th ed., vol. ii. p. 311; Hawk., P. C., bk. i. c. 51). It was usually treated as felony, capital without benefit of clergy, and the extreme punishment was inflicted in certain notable cases, e.g. Dr. Dodd in 1777, and Fauntleroy in 1824. One of the reforms effected through the influence of Romilly and Bentham was the consolidation of many of these enactments in 1830 (11 Geo. IV. and 1 Will. IV. c. 66), and the piecemeal abolition of capital punishment for the offence (7 Will. IV. and 1 Vict. c. 84, s. 1; and 24 & 25 Vict. c. 98, s. 48).

The statutes contained no definition of the elements of the offence

created, and were content to describe it as counterfeiting, forging, or altering, with or without intent to defraud. But *pari passu* with the statutes there grew up a theory that the offence existed fully as a misdemeanour at common law. Stephen (*Dig. Cr. Law*, 5th ed., 350) says that it is so, and punishable on indictment by fine and imprisonment, and defines it as "forging any document by which any other person may be injured, or uttering any such document knowing it to be forged with intent to defraud, whether he effects his purpose or not."

This definition is much wider than that of Hawkins, who confines common law forgery to records and other authentic matters of a public nature, and excludes private letters and the like, offences with respect to which in his view, if punishable at all, fall under the description of CHEATS. But Stephen's opinion, whether warranted or not by the common law or the older authorities, appears to be fully justified by the more modern decisions, e.g. *R. v. Jones*, 1785, 2 East, P. C. 991; *R. v. Ward*, 1725, 2 East, P. C. 861. For these authorities go considerably beyond the notion that a document must be of a public nature to be the subject of forgery at common law. Thus it has been held indictable to forge a certificate of a seaman's character (*R. v. Toshack*, 1849, 1 Den. C. C. 492), a railway pass (*R. v. Boulton*, 1848, 2 Car. & Kir. 604), or testimonials to obtain the office of parish constable (*R. v. Moah*, 1859, 27 L. J. M. C. 205), or of a parish schoolmaster (*R. v. Sharman*, 1854, D. & P. 585). But even to this apparent width of scope some limits have been put, for it was held not forgery to make deliberately false entries in a bank book (*In re Winsor*, 1865, 34 L. J. M. C. 163), or to forge a signature on a painting (*R. v. Closs*, 1857, 27 L. J. M. C. 54), or the wrappers on a proprietary medicine (*R. v. Smith*, 1858, 27 L. J. M. C. 225), or a medical diploma (*R. v. Hodgson*, 1854, 25 L. J. M. C. 78). The result of these decisions and the statutes was that in the absence of a statutory definition the Courts looked to the common law for the elements of the offence, and to the particular enactment for the document in respect of which it could be committed; and there is not even now any statutory definition in England, such as that of the Indian Code, s. 463, which defines the offence as "making any false document or part of a document with intent to cause damage or injury to the public, or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed." And the present state of the statute-book with reference to forgery strikingly illustrates the piecemeal and tentative methods of the English lawgivers. On a defective or doubtful common law definition and inadequate common law punishment, followed hand to mouth legislation, as a difficulty arose, effected by *simplex enumeratio* of any documents, as to which a practical difficulty had arisen in getting convictions under the prior law. This was crowned by filing a number of them together in the Forgery Act, 1861, without any serious attempt at completeness of collection or consistency of expression in the enactments so filed, or of simplifying and reducing their bulk by some simple and comprehensive definition of "document" (*R. v. Riley*, [1896], 1 Q. B. 309, per V. Williams, J., at 322).

In 1878 Mr. R. S. Wright in a report prepared for the Statute Law Committee (1878, C. 178) collected a great mass of other statutes creating and punishing forms of forgery, and proposed to consolidate them so far as possible into a second Act. This suggestion has not been carried out, and the result is that in the case of forgery as of perjury, from lack of an adequate definition of the gist of the offence, the statute-book is cumbered and lawyer and layman alike are perplexed by the vast multiplicity of

forgery clauses scattered up and down the statute-book which might be removed by a complete definition of "instrument" or "document" such as is found in sec. 29 of the Indian Penal Code; in which code the substance of the horde of British enactments is summed up in secs. 462-489.

PRESENT LAW.—From this account of the history of the offence it will be seen how hard it is to exhibit in a compendious form the present law as to forgery. Stephen has been content to classify its varieties by the quantum of punishment (1 *Dig. Cr. Law*, 5th ed., pp. 326-350), distinguishing the cases in which intent to defraud is or is not an element in the offence, or attempting to enumerate all statutory forgeries. But he has also added to the confusion by treating forgery of documents to be used as evidence separately from other forgeries, *vide* pp. 110, 111). The schedule given below is an attempt to give a complete list of statutory crimes of the nature of forgery, whose exact nature must be ascertained by reference to their statutory definition or description. All these enactments must be read by the light of sec. 39 of the Act of 1861, which provides that where other Acts, past or future, punish the forgery, alteration, or uttering of instruments or writing by a special designation, the offence can be treated as coming under the Act of 1861, if the instrument or writing, whatever its special name or description, is in the law a will, deed, bond, negotiable instrument, or warrant or request to pay money, etc., within the Act of 1861.

LEGISLATIVE AND EXECUTIVE DEPARTMENTS OF STATE.

<i>Crown</i> —Seals and Sign Manual	24 & 25 Vict. c. 98, s. 1, F; life.
" Certificates to Copies or Extracts from Proclamations, Regulations, or Orders	31 & 32 Vict. c. 37, s. 4 (2), F; five years. 54 & 55 Vict. c. 69, s. 1.
<i>Army</i> —Pensions, Chelsea	7 Geo. iv. c. 16, s. 38, F; life.
" Prize Money	2 & 3 Will. iv. c. 53, s. 49, F; life.
" Pensions	2 & 3 Vict. c. 51, s. 9, F. 44 & 45 Vict. c. 58, s. 121.
<i>Navy</i> —Enlistment Certificates	5 & 6 Will. iv. c. 24, s. 3, M.
" Pensions	2 & 3 Vict. c. 51, s. 9, F. 24 & 25 Vict. c. 98, ss. 40-42, 50-53.
" Wages, Prize, etc.	28 & 29 Vict. c. 124, ss. 6-7. 58 & 59 Vict. c. 20, s. 154.
" Marine Savings Banks	
<i>Parliament</i> —Private Acts and Journals of either House	8 & 9 Vict. c. 113, s. 4, F.
" Nomination and Ballot Papers	35 & 36 Vict. c. 33, s. 3, M.
<i>Post Office</i> —Money Orders, etc.	43 & 44 Vict. c. 33, ss. 3, 4.
" Stamps, etc.	47 & 48 Vict. c. 76, ss. 6, 7.
" Telegrams	47 & 48 Vict. c. 76, s. 11.
<i>Public Debt and Revenue</i> — Government Annuities	10 Geo. iv. c. 24, s. 41, F; cap.
Stocks and Funds, and Stock Certifi- cates	24 & 25 Vict. c. 98, s. 2, F; life. 33 & 34 Vict. c. 38, ss. 3, 5, 6, F; life.
Attestations to powers of attorney to Transfer Stock	" " s. 4, F; seven years.
False Entries in Books relating to Public Funds	" " s. 5, F; life.
False Dividend Warrants	" " s. 6, F; seven years.
Exchequer Bills, Treasury Bills, Coupons, and Certificates	24 & 25 Vict. c. 98, ss. 8-12, F. 29 & 30 Vict. c. 25, s. 15. 41 & 42 Vict. c. 2, s. 10.
<i>Crown Lands</i> —Woods and Forests, Powers of Attorney, and, Drafts on Bank Account of Commissioners	10 Geo. iv. c. 50, s. 124, F; cap. 24 & 25 Vict. c. 98, s. 5.
<i>Customs</i> —Tobacco Duty Labels	26 & 27 Vict. c. 7, s. 7.
" Names of Commissioners and Officers	38 & 39 Vict. c. 36, ss. 28, 168.

<i>Excise</i> —Permits and Request Notes and Certificates	2 & 3 Will. iv. c. 16, ss. 3, 4, 13.
<i>Income Tax</i> —Certificates and Receipts	{ 11 & 12 Vict. c. 121, s. 18.
<i>Land Tax</i> —Certificates of Redemption	5 & 6 Vict. c. 35, s. 181, F; fourteen years.
<i>Stamps</i> —Local	52 Geo III. c. 143, s. 6, F; cap.
„ Judicature	{ 32 & 33 Vict. c. 49, s. 8, F.
„ General	54 & 55 Vict. c. 69, s. 1.
<i>Public Records</i> —Certifying False Copies, Forging Signatures of Officials	38 & 39 Vict. c. 77, s. 26 (6), F; seven years.
	55 & 56 Vict. c. 39, ss. 13, 18.
	1 & 2 Vict. c. 94, ss. 19, 20, F.

JUDICIAL SEALS, PROCESS, DOCUMENTS, AND EVIDENCE.

Certificates of Conviction	7 & 8 Geo. iv. c. 28, s. 11, F; seven years.
Local Civil Courts of Record	7 & 8 Vict. c. 19, s. 5, F.
Documents made Evidence	8 & 9 Vict. c. 113, s. 4, F.
Court for Crown Cases Reserved; Certificate of Documents made Evidence	{ 11 & 12 Vict. c. 78, s. 6, F; ten years.
Seals of Probate Court, or Signatures of Officers	{ 14 & 15 Vict. c. 99, s. 17, F; seven years.
Courts of Record; Process, etc.	20 & 21 Vict. c. 77, s. 28, F; life.
Courts not of Record (Offences by Officers)	24 & 25 Vict. c. 98, s. 27, F; seven years.
Instruments made Evidence by Past or Future Acts	„ „ s. 28, F; „
Manorial Court Rolls	„ „ s. 29, F; „
Justices of Peace; Orders, etc.	„ „ s. 30, F; life.
Paymaster's Certificates, etc., as to Funds in Court	„ „ s. 32, F; five years.
Tendering in Evidence Colonial Proclamations, etc., known to be forged or printed without authority	{ 24 & 25 Vict. c. 98, s. 12.
	35 & 36 Vict. c. 44, s. 12.
County Courts	31 & 32 Vict. c. 37, s. 4, F.
Commissioners for Oaths	45 & 46 Vict. c. 9, s. 3.
Recognisances	51 & 52 Vict. c. 43, s. 180.
Lunatics	52 & 53 Vict. c. 10, s. 8.
Marriage Licences	24 & 25 Vict. c. 98, s. 34, F.
	53 & 54 Vict. c. 5, s. 147.
	24 & 25 Vict. c. 98, s. 35, F.

COLONIES AND INDIA.

East India Bonds	24 & 25 Vict. c. 98, s. 7, F; life.
India Stock Certificates	{ 25 & 26 Vict. c. 7, s. 14, F.
„ Debentures	26 & 27 Vict. c. 73, ss. 13–15.
Colonial Stock Transfers	37 & 38 Vict. c. 3, s. 13.
	{ 24 & 25 Vict. c. 98, s. 2, F; life.
	40 & 41 Vict. c. 59, s. 21.

MUNICIPAL AFFAIRS.

London County Council Stock	{ 24 & 25 Vict. c. 98, s. 1.
Local Loans, Debentures, etc.	32 & 33 Vict. c. 102, ss. 19, 21, F.
Boroughs	38 & 39 Vict. c. 83, s. 32.
	45 & 46 Vict. c. 50, s. 235.

LEGAL AND MERCANTILE DOCUMENTS.

Bank Notes	24 & 25 Vict. c. 98, ss. 12–19, F; life.
Bills of Exchange and Cheques, and Bankers' Orders	{ „ „ ss. 22, 24, 25, F.
Deeds and Bonds	46 & 47 Vict. c. 55, s. 17.
Orders or Receipts for Money or Goods	24 & 25 Vict. c. 98, s. 20, F; life.
Debentures	24 & 25 Vict. c. 98, ss. 23, 24, F.
Share Warrants, Coupons, etc.	24 & 25 Vict. c. 98, s. 26, F; fourteen years.
Wills, and the like	30 & 31 Vict. c. 131, ss. 34, 36, F.
	24 & 25 Vict. c. 98, s. 21, F; life.

PROFESSIONS AND CALLINGS.

Beerhouse Certificates	32 & 33 Vict. c. 27, s. 11, M; summ. proc.
Chimney-Sweepers' Certificates	38 & 39 Vict. c. 70, s. 19, M; „
Coal Mines Certificates	50 & 51 Vict. c. 58, s. 32, M.
Dentists' Registration	41 & 42 Vict. c. 33, ss. 34, 35.

Explosives ; Licences and other Documents under the Act	38 & 39 Vict. c. 17, s. 81, M.
Factories and Workshops Certificates	41 & 42 Vict. c. 16, ss. 70, 85, M. ; summ. proc.
Gas ; Stamps on Meters	22 & 23 Vict. c. 66, s. 14, M ; summ. proc.
Hackney Carriages ; Licences or Tickets	6 & 7 Vict. c. 86, s. 20, M.
Hawkers' Certificates	51 & 52 Vict. c. 33, s. 4, M ; summ. proc.
Hops ; False Marking	29 & 30 Vict. c. 37.
Linen ; Counterfeit Stamps	{ 17 Geo. II. c. 30, ss. 1, 2. 18 Geo. II. c. 24, ss. 2-4.
Medical Practitioners' Diplomas, etc.	21 & 22 Vict. c. 90, s. 40, .
Merchandise Marks	50 & 51 Vict. c. 28.
Merchant Shipping ; Fund	14 & 15 Vict. c. 102, s. 55.
„ Various	59 & 60 Vict. c. 60, ss. 66, 67, 104, 130, 154, 282, 564, 695 (4).
Pawnbrokers' Certificates	35 & 36 Vict. c. 93, s. 44, M ; summ. proc.
Pedlars' Certificates	34 & 35 Vict. c. 96, s. 12.
Plate, Stamps on	{ 13 Geo. III. c. 52, s. 14. 7 & 8 Vict. c. 22, s. 2, F ; fourteen years.
Sale of Food and Drugs ; Certificates or Warranties	38 & 39 Vict. c. 63, s. 27, M.
Servants' Characters	32 Geo. III. c. 56.
Slave Trade ; Documents relating to Slave Laws	5 Geo. IV. c. 113, s. 10, F ; fourteen years.
Solicitors ; Punishment for Practising after Conviction of Forgery	12 Geo. I. c. 29, s. 4.
Weights and Measures, Forged and Counterfeit Stamps on	41 & 42 Vict. c. 49, s. 32.

PUBLIC REGISTERS.

Aliens	6 & 7 Will. IV. c. 11, ss. 9, 10.
Copyright ; Stationers' Hall, False Entries	5 & 6 Vict. c. 45, s. 12 M.
„ Fraudulent Infringements	25 & 26 Vict. c. 68, s. 7, M ; summ. proc.
Land ; Registers of Deeds	{ 24 & 25 Vict. c. 98, s. 31, F ; fourteen years. 25 & 26 Vict. c. 53.
Declaration of Title ; Documents and Cer- tificates	{ 25 & 26 Vict. c. 67, s. 45, F ; life. 38 & 39 Vict. c. 87, ss. 99, 100, 101, 102, 103, 113 (5).
Nominees to Government Annuities	10 Geo. IV. c. 24, s. 41, F ; cap.
„ to Navy Enlistment	2 & 3 Will. IV. c. 24, s. 3, F.
Non-parochial Registers	3 & 4 Vict. c. 92, s. 8.
Burial Register Books	20 & 21 Vict. c. 81, s. 5, F.
Births,* Deaths, Marriages, Baptisms, and Burials	{ 21 & 22 Vict. c. 25, s. 3. 24 & 25 Vict. c. 98, ss. 36, 37.
Patents, False Entries as to	46 & 47 Vict. c. 57, s. 93, M.

It is quite impossible within the limits of this article to deal with all the case law on the subject of forgery. These decisions are elaborately enumerated in Archbold (21st ed.), 648-702, and Russell on *Crimes*, 6th ed., vol. ii. pp. 564, 766, 904, and turn in very many instances on the question whether the description of the document alleged to be forged, etc., or its character as proved, bring it within the statutory definition of the particular form of forgery alleged.

The empirical methods of the English lawgiver are further illustrated by comparison of the offences which he has created with FALSE *Pretences*, falsification of accounts (see ACCOUNTS and PERJURY).

The use of forged documents to obtain property involves a false pretence by words or conduct ; tendering them in evidence usually involves perjury ; while falsification of accounts, so far as it consists in making false entries, naturally falls within any non-legal definition of forgery, and if *In re Arton*, No. 2, [1896] Q. B. be correct, is so treated in French law.

Besides the actual forgery or uttering of documents and seals, there are

in the Act of 1861 provisions for punishing the preparation or possession of paper plates and materials for forging Exchequer bills and the like, bank notes, or foreign bills or securities (24 & 25 Vict. c. 98, ss. 9, 10, 11, 14-20), and for the seizure and confiscation of such paper, etc. (s. 46). Sec. 45 defines the meaning of "criminal possession," and the burden of proof as to the innocence of his possession appears to fall on the accused.

It is also a felony, with intent to defraud, to demand, receive, or obtain directly or through another, or to attempt to receive, etc., any property by virtue of an instrument known to be forged, or by a probate of a forged will, or by letters of administration obtained by perjury (24 & 25 Vict. c. 98, s. 38). This enactment has a wider effect than the clauses of the Act defining forgeries, and extends to forgery at common law; and the word "instrument" has been held to include telegrams (*R. v. Riley*, [1896] 1 Q. B. 309).

Constituent Elements of Forgery.—For the practical purposes of the administration of the Criminal law a writing is said to be forged—(1) where the whole of it is deliberately, and without the authority of the person from whom it purports to emanate, fabricated for use as a genuine writing; or (2) when a writing, authentic in its original form, is deliberately so altered without the authority of the maker of the writing or of the law, where the alteration if valid would change the legal effect of the writing; (3) when a writing is deliberately signed with a name which the signatory is not authorised to write, or the name of a fictitious person alleged to exist, or of a person intended to be mistaken for the person who wrote the signature, or of a person intended to be personated by him (see *Steph. Dig. Cr. Law*, 5th ed., 323).

This last rule does not apply in a case where a man has adopted a fictitious name as his own; but only where the fictitious name cloaks a false pretence (see *Steph. Dig. Cr. Law*, 5th ed., p. 327).

It does not matter whether the falsification is of the whole document, or of a date, or name, or figure, or clause, provided that it is inserted deliberately, and would have a material effect on the liability or obligation created if the writing were really what the falsification makes it appear to be (*R. v. Ritson*, 1869, L. R. 1 C. C. R. 200; *R. v. Riley*, [1896] 1 Q. B. 309).

For a writing to be forged, the alteration must be effected by the accused or at his procurement, whether by a guilty or innocent agent; but it is not forgery to induce another by a fraud on him to execute a document (*R. v. Collins*, 1843, 2 Moo. & R. 461).

This offence is punished by sec. 90 of the Larceny Act, 1861.

A writing is said to be uttered when it is shown to any person, put into circulation, offered, disposed of, or put off, with knowledge that it is forged (*R. v. Ion*, 1852, 2 Den. C. C. 475).

Uttering is closely related to obtaining property by FALSE Pretences, and where it involves allegation of identity with the alleged signatory of the document, amounts to PERSONATION.

Following Blackstone's definition, copied from Hawkins, that forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right (4 Com. 247), intent to defraud is construed as intent to deprive another of some right or property, i.e. to commit a specific wrong. It is distinct from mere intent to deceive.

Forgery of a letter as a practical joke, while it might, in certain events, create a cause of action (*Wilkinson v. Downton*, [1897] 1 Q. B. 57), is not a forgery for which a criminal remedy could be pursued (see *R. v. Hodgson*, 1856, Dears. & B. C. C. 3), except on a statute in which the gist of the

offence is a general intent to deceive, or in which "intent" to defraud" is not an element of the offence.

Form of Indictment.—The form usual for an indictment for forgery at common law is given in Archbold, *Cr. Pl.*, 21st ed., 689.

Indictments for statutory forgeries must contain the operative words of the statute (*R. v. Brewer*, 1834, 6 Car. & P. 363, and see 7 Geo. IV. c. 34, s. 21). Where an intent to defraud is an element in the definition of the offence, it may be stated and proved generally (24 & 25 Vict. c. 98, s. 44), except where a particular intent is specified in the statute (*e.g.* 29 & 30 Vict. c. 25, s. 15).

It is enough to describe a forged instrument (*i.e.* writing) by its usual name or designation without otherwise describing it or its value, or setting out a copy or facsimile, and similar provision is made as to indictments for engraving, etc., or possessing the materials for forgery (24 & 25 Vict. c. 98, ss. 43, 44).

Court of Trial.—Courts of Quarter Sessions had not any jurisdiction to try forgery at common law, and this incapacity has been continued by 5 & 6 Vict. c. 38.

Venue.—All charges of offences against the Act of 1861, or of forging or altering, or of uttering, etc., forged documents contrary to the common law or any other statute, may be tried in any county or place in which the accused is apprehended or in custody; and the same rule applies to accessories or abettors (24 & 25 Vict. c. 98, s. 41), and offences mentioned in the Act of 1861, committed within the admiralty jurisdiction (s. 50). A similar provision is made as to forgeries punishable under the Commissioners of Oaths Act, 1889 (52 Vict. c. 10, s. 9). It is not necessary to state in the indictment that the accused was apprehended, or is in custody in the county of trial (*R. v. James*, 1836, 7 Car. & P. 553; *R. v. Smythies*, 1850, 19 L. J. M. C. 31).

Questions of some difficulty arise as to documents forged in one country and uttered in another through the post, or by innocent agents, or where the forged document is negotiated in one country and presented for payment in another. As between England and Ireland this is regulated by 24 & 25 Vict. c. 98, s. 40, as to offences within the Act of 1861.

Punishment.—The punishment of common law forgery is by imprisonment or fine at discretion, and formerly also by pillory.

The punishment of each statutory forgery depends on the statute which creates it, as in the case of forgeries (1) made subject by any Act to the punishments of the Act of 1562, or (2) to capital punishment (1) on 24 & 25 Vict. c. 98, s. 47, and (2) on 7 Will. IV. and 1 Vict. c. 84, s. 1, and 24 & 25 Vict. c. 98, s. 48, as modified by 54 & 55 Vict. c. 69, s. 1.

Accessories before the fact to forgeries under the Act of 1861 are punishable as principal offenders; accessories after the fact by imprisonment not exceeding two years with or without hard labour (24 & 25 Vict. c. 98, s. 49); while accessories to other statutory forgeries are dealt with under 24 & 25 Vict. c. 95, which also provides for the mode of trial, etc., of all accessories. See ABETTOR; ACCESSORY.

Power is given to Courts of justice to impound forged documents which are tendered in evidence (8 & 9 Vict. c. 113, s. 4; 14 & 15 Vict. c. 99, s. 17; 18 & 19 Vict. c. 42, s. 5). A similar power is given to pawnbrokers to whom a forged pawn-ticket is presented (35 & 36 Vict. c. 93, s. 49). When the documents are impounded in the High Court access to them is obtainable under Order 42, rr. 33 A, B (see *Annual Practice*, 1898, p. 806).

Civil Remedies.—The Act 1 Hen. V. c. 3 gave a civil remedy to persons injured by forged deeds. But independently of the statute, a

person so injured, whether by being deprived of a right or by parting with property in it, is entitled to recover damages or the property parted with.

Where the forged document is fraudulently and successfully used out of Court an action for deceit will lie. It seems no longer to be subject to be delayed or defeated because the forger has not been prosecuted (Bullen and Leake, *Prec. Pl.*, 5th ed., 978). But where the payee acted in good faith the payer cannot recover the sum paid (*Price v. Neal*, 1762, 3 Burr. 1355; *London and River Plate Bank v. Liverpool Bank*, [1896] 1 Q. B. 7). Where a forged document is put in evidence in or made the ground of action, and its falsity is proved either incidentally in the trial or on a issue raised in the pleadings, e.g. *non est factum*, the party against whom it is tendered succeeds *pro tanto*, and the document may be impounded by the Court (*vide ante*). Where it is in existence but not in circulation, a person who may be prejudiced by its user is entitled to sue for its delivery up for cancellation, or if it is negotiable its negotiation may be restrained by injunction (*Esdaile v. La Nauze*, 1835, 1 Y. & C. 394). People who pay on the authority of a forged document cannot charge the person on whose account the payment is made with the amount paid, and their only remedy is against the recipient (*Bank of Ireland v. Evans' Charities*, 1855, 5 H. L. 389; *Bank of England v. Vagliano*, [1891] App. Cas. 107; *Clutton v. Attenborough*, [1897] App. Cas. 90; *Scholfield v. Lord Londesborough*, [1896] App. Cas. 514; and see Beven, *Negligence*, 2nd ed., 1492).

In other words, a person who holds funds or property for another cannot justify parting with them on the faith of a forged document, and may be sued for a declaration of liability or accountability in the case of funds in his hand as agent, or in trover or conversion as to property the subject of bailment; while in the case of parting with the possession of land on forged deeds, the true owner, apart from any remedy against the defaulting agent or mandatory, can retake possession peaceably or sue on ejectment (see Chalmers, *Bills of Exchange*, 5th ed., 72, 206, 258).

These rules apply even to negotiable instruments (see 45 & 46 Vict. c. 61, s. 24; Beven, *Negligence*, 2nd ed., 1550). But bankers are protected by sec. 60 of the Bills of Exchange Act, 1882, as to forged indorsements on a cheque, but not as to forged signatures of a drawer (Beven, *Negligence*, 2nd ed., 1522).

The protection does not extend to bills domiciled at the bank, nor unless the payment is made in good faith and in the ordinary course of business. In *Young v. Grote*, 1827, 4 Bing. 253, was propounded the doctrine that a person by whose negligence a forgery has been rendered possible was estopped from claiming indemnity in respect of his property parted with by another person on the forged document. The exact nature and correctness of this decision has been the subject of much discussion and criticism (*vide* Beven, pp. 1575-1600); but the authority of the case is greatly impaired if not destroyed by *Scholfield v. Lord Londesborough*, [1896] App. Cas. 514, 532, where the law lords were of opinion that it was not negligence not to foresee or provide against the commission of a crime.

[*Authorities*.—3 *Co. Inst.* 169; 2 Hale, P. C. 682; Hawk., P. C., bk. i. c. 51; Foster, *Crown Law*, 2nd ed., 116; Pollock and Maitland, *Hist. Eng. Law*, vol. ii. pp. 503, 538; 2 East, P. C. 840-1003; Greaves, *Crim. Law Consolidation Acts*; Pike, *Hist. Crime*, vol. i. pp. 269-276; ii. pp. 539-541; Burn, *Justice*, 30th ed., vol. ii. pp. 625-682; Steph. *Dig. Cr. Law*, 5th ed., 321-350; 3 Steph. *Hist. Cr. Law*, 180; Russell on *Crimes*, 6th ed., vol. ii. pp. 460, 564-769, 899-958; Archbold, *Cr. Pl.*, 21st ed., 641-701; Mayne,

Ind. Cr. Law, 1896, p. 749. And as to the civil aspects of forgery, Chalmers, *Bills of Exchange*, 5th ed., 72, 206, 258; Beven, *Negligence*, 2nd ed.]

Form.—The term “form” is used in law in contradistinction to “substance.” Illustrations of its chief uses will be found in the articles ABATEMENT; ABATEMENT, PLEAS IN; AID BY VERDICT; AMENDMENT IN CRIMINAL PROCEEDINGS; AMENDMENT OF PLEADINGS; CONTRA FORMAM STATUTI; DEFECT CURED BY VERDICT; DEMURRER; DILATORY PLEA. See also IN ACCORDANCE WITH THE FORM; IN THE FORM.

Formal.—See FORM. As to formal defects in bankruptcy petition, see vol. i. p. 491. See further, Stroud, *Jud. Dict.*, s.v. “Formal.”

Former Titles and Incumbrances.—As to covenants indemnifying against these, see Platt on *Covenants*, 332, 333.

Fornication (Lat. *fornix*; cp. Gk. *πόρνη*) is voluntary sexual intercourse between persons who are not husband and wife (see *Mirror of Justice*, 7 Seld. Soc. Publ. 29). Where one of them is married, such incontinence is usually termed ADULTERY.

1. It would seem that in early times common law Courts, and, in particular, Courts leet, had jurisdiction over fornication, and could impose wites or fines known as the leyer-wite on offenders of either sex, and the child-wite if a bastard was born (see 1247, 2 Seld. Soc. Publ. 12; 1278, *ibid.* 92; and 1550, 5 Seld. Soc. Publ. 87; 2 Co. *Inst.* 488). The jurisdiction was concurrent with that of the Ecclesiastical Courts, and till the Statute *Circumspectè Agatis* (13 Edw. I. st. 4) the common law Courts used to interfere by prohibition with the canonical jurisdiction. The civil jurisdiction has fallen into utter disuse, though fornication is always described as “unlawful,” as it is, but not criminal (*Hayes v. Stephenson*, 1861, 25 J.P. 329), though there is some old authority to the effect that it is indictable if open, *i.e.* notorious and grossly scandalous (see 1 Bishop, *Amer. Crim. Law*, s. 501). And it is now punished only if committed in a public place (see INDECENCY), or with girls under sixteen (see RAPE, etc.; see also BROTHEL; PROSTITUTE).

2. By the Ecclesiastical Courts it was and is punishable as a sin *pro salute animæ* (*Wheatley v. Fowler*, 1757, 2 Lee Consist. 376; Canons of 1603, No. 109). Since 1787 (27 Geo. III. c. 44) ecclesiastical suits for incontinence must be instituted within eight months of the offence, and may not be brought or continued if the parties have lawfully married. The decree of the Ecclesiastical Court may be enforced by the High Court by imprisonment (53 Geo. III. c. 127; Steph. *Dig. Crim. Law*, 5th ed., p. 132).

Incontinence by the clergy is cognisable under the Clergy Discipline Acts, 1840 (3 & 4 Vict. c. 86) and 1892 (55 & 56 Vict. c. 32, ss. 1 (1) (6), 2), which appear to exclude the jurisdiction of any but the statutory Courts in cases to which they apply.

3. Neither party to voluntary but illicit sexual intercourse has any civil remedy for injury caused thereby (*Hegarty v. Shins*, 1878, 14 Cox C. C. 124, 145). See BASTARDY; SEDUCTION.

4. Under the customs of certain ancient towns harlots were liable to

expulsion, *e.g.* *Norwich* (1312, 5 Seld. Soc. Publ. 59) and *London*. Certain cases of this kind were until 1891 (54 & 55 Vict. c. 51) material in cases of slander where special damage could not be proved (*Galway v. Marshall*, 1854, 23 L. J. Ex. 78). And under custom of certain manors a widow forfeited her free bench for unchastity (see 2 Seld. Soc. Publ. 162).

[*Authorities*.—2 Phill. *Ecll. Law*, 2nd ed., p. 841; Burn, *Justice*, 30th ed., tit. "Lewdness."]

Forthwith.—It is pointed out by Stroud, *Jud. Dict.*, *s.v.* "Forthwith," that this term means (1) "forthwith on the application of the party entitled to have the act done," in cases of ministerial acts and acts demandable *ex debito justitiæ* (take as a typical case, *Costar v. Hetherington*, 1859, 28 L. J. M. C. 198); (2) "immediately," in cases of judicial acts (see *R. v. Francis*, Ca. t. Hard. 115); (3) "with all reasonable celerity," in contracts and ordinary transactions of life (see *Burgess v. Boetcher*, 1845, 7 Man. & G. 494). For further illustrations, see Stroud, *ad loc.*

Fortifications.—Before the reign of William III., when the modern system of appropriating supplies granted by Parliament to fortifications, and other works, for the defence of the realm, came into use, certain ancient fortresses at the mouths of the principal rivers, and at various points of the coast, had been erected and maintained by the Crown, in virtue of its prerogative, and they belonged to it as its own estate and as part of the hereditary possessions of the Crown. Various military tenures provided the necessary costs of maintenance, repair, and defence upon invasion of the kingdom. These ancient fortresses and lands are now vested in the Secretary of State for War, and if they are sold the proceeds are paid to the Office of Woods and Forests, and this has been done in recent years. The lands and fortifications acquired under the various special Fortification Acts from the 7th Anne to 55 Geo. III. c. 123, for compulsorily acquiring lands for the erection of fortifications at public cost, and under the Defence Acts (*q.v.*) which superseded them, are held by the Secretary of State for War in trust for the Crown, in whom the Constitution vests the defence of the nation; and they form part of the general system of the administration of the army and military forces under his control. There still, however, remain two of the old military governorships as relics of the ancient system—that of the Tower of London and the Lord Warden of the Cinque Ports (*q.v.*). The governors of fortresses in former times used to man them from the Trained Bands, and thus the Constable of the Tower is the Commander-in-Chief of the Trained Bands of the Tower Hamlets acting under the 37 Geo. III. c. 25, and the Lord Warden the Commander-in-Chief of all the Trained Bands within his jurisdiction, acting under the patent of his appointment, which is recognised in all the militia statutes (see *MILITIA*). The militia, and not the soldiers of the standing army, were the constitutional force for garrisoning the fortresses, and when troops have been stationed in the Tower it has been under an old-established rule that it must be by the order of the Secretary of State, and not upon orders from any military officer. By the Colonial Fortifications Act, 1877 (40 & 41 Vict. c. 23), power is given to the Queen by Order in Council to vest the fortifications, works, buildings, and lands which had previously been vested in the sovereign, the Secretary of State for War, or some other officer, such as the Commanding Royal Engineer,

in the governor of the colony, for such estate and interest, and under such conditions as may be specified in the order. By the third section India is excluded from the definition of "colony," which otherwise includes all parts of Her Majesty's dominions situate outside the United Kingdom, the Channel Islands, and Isle of Man. In most of the self-governing colonies the barracks and fortifications, with the land belonging to them, have been vacated by the Imperial troops, and the arms and munitions of war in actual use handed over to the colonial authorities; but this had been done before the Act of 1877 above mentioned.

The Official Secrets Act, 1889 (52 & 53 Vict. c. 52), making it felony or misdemeanour to wrongfully obtain or disclose information relating to places belonging to Her Majesty, includes, *inter alia*, fortresses (see article OFFICIAL SECRETS).

For the military offence of shamefully abandoning or delivering up any garrison, etc., by any governor or commanding officer, and for compelling or inducing such an act, see sec. 4 of Army Act, 1881 (44 & 45 Vict. c. 58). By sec. 23 of the same Act every person subject to military law who (*inter alia*) lays any duty upon, or takes any fee or advantage, in respect of, or is in any way interested in, the sale of provisions or merchandise brought into any garrison, etc., in which he has any command or authority, is liable, on conviction by court-martial, to imprisonment with or without hard labour for not exceeding two years, or such other punishment as provided by sec. 44 of the Act.

[*Authorities*.—Clode, *Military Forces of the Crown*; St. Bl. vol. ii. pp. 505, 506; Anson, *Law and Custom of the Constitution*, 2nd ed., pp. 376, 388; *Manual Military Law*, War Office, 1894.]

Fortune Telling.—By an Act of 1736 (9 Geo. II. c. 5) the former penalties of the common and statute law for the offence of witchcraft were abolished (see WITCHCRAFT). By sec. 4 it was made a misdemeanour, punishable on indictment or information by twelve months' imprisonment, to undertake to tell fortunes or to pretend, from skill in any occult or crafty science, where lost or stolen goods could be found. The offender can also be required to give sureties for good behaviour, and be imprisoned further until they are given. Until 1837 (7 Will. IV. and 1 Vict. c. 23) the offender might be put in the pillory.

Prosecutions under this Act are never instituted, since under sec. 4 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), every person is summarily punishable as a rogue and a vagabond who pretends or proposes to tell fortunes, or uses any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose. As to the procedure under this Act, see VAGABOND. This enactment has been applied to astrologers (*Penny v. Hanson*, 1886, 18 Q. B. D. 478), and to spiritualists, who profess ability to commune with the dead (*Monck v. Hilton*, 1877, 2 Ex. D. 268; *R. v. Middlesex Justices*, 1877, 2 Q. B. D. 516; and see *R. v. Krampa*, 1896, 60 J. P. 347).

Forwarding Agent.—This is a person who ships goods from England for foreign or English merchants, and his contractual rights and liabilities are governed by the ordinary law of agency (see PRINCIPAL AND AGENT). Thus if the contract of shipment does not show that it is entered into on behalf of a principal, the person making it is liable under it, whether the principal is also liable or not (*Lidgett v. Perrin*, 1862, 2 F. & F. 763, where

the agreement to ship was made by agents, and they were held liable though the bills of lading were made out in the name of the principal), while if the contract is made by a person expressly as agent he is not liable under it (*Robinson v. Lennard*, 1855, 24 L. J. Q. B. 275). There is, however, a presumption that, where a contract is made by a person in England on behalf of a foreign principal, the agent does not pledge his principal's credit, but is personally liable (*Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 598; *Elbinger v. Clay*, 1873, 8 Ch. D. 313, Blackburn J.), unless he makes the contrary very clear (*Green v. Kopke*, 1856, 18 C. B. 549, "as agent and on behalf of principals"; and so *Deslandes v. Gregory*, 1860, 30 L. J. Q. B. 36). A forwarding agent, as he may be personally liable on a contract, so may be also personally entitled under it, and can enforce it (*Joseph v. Knox*, 1813, 3 Camp. 320, agents shipping goods in their own names under a bill of lading and paying the freight on them); though if the consignee of the goods is to pay the freight and the goods are shipped to his order he only can sue (*Brown v. Hodgson*, 1809, 2 Camp. 36).

With regard to the right of stopping *in transitu* (*q.v.*) goods delivered by the seller to an agent of the buyer, who is charged with forwarding them to him, the general rule established by the decisions is, that, if the buyer gives no notification to the seller of what will be the destination of the goods after they reach the hands of the forwarding agent, the transit is at an end and the seller's right to stop them is lost (*Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 1877, 5 Ch. D. 205; *Kendall v. Marshall, Stevens, & Co.*, 1883, 11 Q. B. D. 356); while, on the other hand, where the further destination of the goods after they reach the forwarding agent's hands is notified by the buyer to the seller, whether in the contract or otherwise, the transit continues (*Coates v. Railton*, 1827, 6 Barn. & Cress. 422; *Nicholls v. Le Feuvre*, 1835, 2 Bing. N. C. 81; *Rodger v. Comptoir d'Escompte de Paris*, 1869, L. R. 2 P. C. 393; *Ex parte Watson*, 1877, 5 Ch. D. 35; *Bethell v. Clark*, 1888, 20 Q. B. D. 615; *Lyons v. Hoffnung*, 1890, 15 App. Cas. 391). Where, however, the buyer notifies to the seller a further destination for the goods than the forwarding agent (the "destination" of goods meaning "a particular person at a particular place," Brett, M. R., *Ex parte Miles*, 1885, 15 Q. B. D. 39, 44), but he does not give the forwarding agent instructions what destination to forward them to, the transit ends when they are delivered to the forwarding agent's hands; for "the goods have so far got to the end of their journey that they wait for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such orders they would remain stationary" (Lord Ellenborough, *Dixon v. Balduen*, 1804, 5 East, 175; 7 R. R. 681; so *Ex parte Miles*, above).

Fossils.—This term usually applies only to metallic minerals, but may include stones dug and quarried (*Rosse v. Wainman*, 1845, 15 L. J. Ex. 67; 2 Ex. Rep. 800). A grant by a man of all his lands includes all his mines of metal and other fossils (Black, ii. *Com.* 18; and see Sheph. *Touch.* 90).

Fouling Stream.—See STREAM.

Found.—See INTOXICATING LIQUORS (*Offences*).

Foundation of Charity, etc.—As to meaning of the terms “foundation” and “founder” in this sense, see *St. Leonard's Trustees v. Charity Commissioners*, 1884, 10 App. Cas. 304; and see article CHARITIES, vol. ii. at pp. 464, 465, and *passim*.

Found Committing.—This expression is used in enactments giving power to arrest without warrant, *e.g.* as to indictable offences in the night (14 & 15 Vict. c. 19, s. 11; and *cp.* 24 & 25 Vict. c. 100, s. 66), as to offences under the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 103), or the Malicious Damage Act, 1861 (c. 97, s. 61), or the Coinage Offences Act, 1861 (c. 99, s. 31); and see ARREST.

The meaning of the expression has from time to time come into controversy in actions for false imprisonment, in which the defendant set up the statute as an answer to the action. In *Downing v. Capel*, 1867, L. R. 2 C. P. 461, and *Griffiths v. Taylor*, 1877, 2 C. P. D. 194, it appears, for the purposes of giving a right to notice of action, to have been regarded as meaning “found under such circumstances as to give cause for reasonable and *bond fide* belief that the offence was being committed.” But NOTICE OF ACTION is now abolished, and these cases do not warrant the conclusion that the arrest can be justified unless the person arrested was caught *flagrante delicto*.

Founded on.—As to when an action is “founded on” contract or tort (for the class of cases in which this distinction is important, see article COUNTY COURTS, vol. iii. at p. 535), see *Bryant v. Herbert*, 1878, 3 C. P. D. 389; Stroud, *s.v.* “Founded on”; and *Turner v. Stallibrass*, W. N. [97] 167.

Founder.—See FOUNDATION.

Foundling Hospitals.—See HOSPITALS.

Foundry.—See FACTORIES AND WORKSHOPS.

Fountains.—The supply of water for fountains, whether public or private, is not supply for a domestic purpose (Water Works Clauses Act, 1863, 26 & 27 Vict. c. 93, s. 12). Local authorities, except in London, have not any general statutory authority to set up or pay for the water of public drinking fountains, whether for the use of men or animals. Such fountains are usually set up by private generosity only. See DRINKING FOUNTAINS.

Abstraction of the fittings appears to be punishable under sec. 31 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), modified by sec. 1 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69). Malicious injury to a fountain is punishable under secs. 51, 52 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), or, if it be a work of art, by sec. 39.

Four Day Orders.—See ORDERS.

Four Seas.—These are (1) the Atlantic, including the Irish Sea and St. George's Channel; (2) the North Sea; (3) the German Ocean; (4) the English Channel. "Within the four seas" (*intra quatuor maria*) means "within the kingdom of England and the dominions of the same kingdom" (*Co. Lit.* 1078). See further, ABSENCE BEYOND SEAS; FOREIGN WATERS; TERRITORIAL WATERS.

- **F. O. W.**—These letters stand for "first open water," and are used in charter-parties with reference to the ports in the Baltic to mean "immediately after the ice breaks up."

Fowls, Domestic, are valuable property, and the subject of larceny. If they stray on to the land of others they may be distrained (*DISTRESS, Damage Fasant*); but may not be killed. If they are, the person killing them is liable civilly, but not criminally, unless the killing is clearly malicious or accompanied by cruelty (*Smith v. Williams*, 1892, 56 J. P. 840; 9 T. L. R. 9). Their owner appears to be liable civilly for any damage which they do.

A by-law imposing a penalty on persons whose fowls strayed on a public pleasure ground has been held *ultra vires* (*Torquay Local Board v. Briddle*, 1882, 47 J. P. 183; and see BIRDS).

Fowls of Warren are those birds which the grantee of the franchise of free warren acquires the exclusive right to preserve, take, and keep as his own qualified property, and to prevent others from killing or taking, within the local limits of the franchise, whether on his own lands or those of others. They include pheasants and partridges (but not grouse), and it is said herons, mallards, woodcock, quails, and rails (*Co. Lit.* 233 a; *Barrington's case*, 1610, 8 Co. Rep. 136 b, 138 b; *Duke of Devonshire v. Lodge*, 1827, 7 Barn. & Cress. 36; see Warry, *Game Laws*, 15; Oke, *Game Laws*, 4th ed. by Bund, 25).

Fox; Fox-Hunting.—The fox as a wild animal is not the subject of larceny at common law. When actually killed or reduced into possession, it becomes the property of the captor. But it is not clear whether if tame and in confinement it falls within sec. 21 of the Larceny Act, 1861. There is old authority that if a tame fox escapes, the former possessor is not liable for the damage which it does; but it seems inconsistent with the modern decisions as to liability for damage by noxious animals kept for private amusement or profit (Beven, *Negligence*, 2nd ed., 609); and on the principle of *Farrer v. Nelson*, 1885, 15 Q. B. D. 258, it would seem that people who import foxes into a district for hunting would be liable for their depredations on the lands of adjoining occupiers.

Any person is entitled to pursue and kill a fox on his own land, subject to the unwritten law of hunting counties, which visits with social ostracism those who kill foxes by traps or guns. The Game Act, 1831, exempts from its penalties persons who trespass in fresh pursuit of a fox already started upon other land.

At common law it was said (1 & 2 Will. iv. c. 32) that a fox being a noxious wild beast might lawfully be pursued and killed on the land of

others (*Gundry v. Feltham*, 1796, 1 T. R. 334; 1 R. R. 215; *Hill v. Walker*, 1806, Peake Add. Cas. 234; Beven, *Negligence*, 2nd ed., 630 n 5). But the right did not extend to the digging the land of others to unearth them (Cro. (2), 321). And sec. 46 of the Act of 1831 specially saves the common law rights of the owner of land in respect of trespass in pursuit of wild animals; and while under sec. 52 of the Malicious Damage Act, 1861, criminal proceedings cannot be taken for any actual damage not wilful or malicious committed in hunting, since 1809 it may be taken as settled that a master of hounds and those who follow hounds cannot justify in civil proceedings any trespass during fox-hunting, and that the master of the hounds is liable for the trespass of his servants and friends with his hounds (*Hume v. Oldacre*, 1816, 1 Stark. N. P. 351; 18 R. R. 779; *Deane v. Clayton*, 1817, 7 Taun. 489; 18 R. R. 553; *Baker v. Berkeley*, 1827, 3 Car. & P. 33), and cannot justify entry or assault with a view to prevent his eviction from lands which he has entered in pursuit of a fox without express or tacit licence from the occupier. Individual members of the hunt are, of course, only liable for their own trespasses (*Paget v. Birkbeck*, 1863, 3 F. & F. 683, 686 n), and the master is not liable when members of the hunt trespass on lands off which he has warned them (*Baker v. Berkeley*, *ubi supra*).

[*Authorities*.—Beven on *Negligence*, 2nd ed., 609, 629, 650; Warry, *Game Laws*, 51, 82; Oke, *Game Laws*, 4th ed. by Bund, 117, 132.]

Fox's Libel Act (32 Geo. III. c. 60).—This Act is one of many instances which prove the value and importance of purely adjective law. It is an Act dealing solely with one point of procedure, and a somewhat minute point; but the consequences of its enactment have been enormous. It was, moreover, "only declaratory of the common law" (per Brett, L.J., 1880, 5 C. P. D. at p. 539). It merely "put prosecutions for libel on the same footing as other criminal cases" (per Parke, B., 1840, 6 Mee. & W. at p. 108). But it established the freedom of the press in England.

The common law had clearly defined the relative provinces of judge and jury in all proceedings for libel. It is for the judge to direct the jury what in law a libel is; and then it is for the jury to decide, in accordance with that direction, whether the particular publication before them is or is not a libel. This was the rule originally both in civil and criminal cases. But in the days of George III. a serious innovation was made, which created much bitterness against the judges. Lord Mansfield, C.J., held repeatedly that in a criminal case the only questions for the jury to decide were the fact of publication and the meaning of the words; and that whether the words were libellous or not was a question of law for the Court to decide (see *R. v. Dr. Shebbeare*, 1758; *R. v. Woodfall*, 1770, 5 Burr. 2661; and *R. v. The Dean of St. Asaph*, 1784, 3 T. R. 428-432 n). The rule in civil cases remained unchanged. In 1793 Mr. Fox brought in a bill to remedy this abuse and restore the former practice; Mr. Pitt supported him, and the measure passed. It "declares and enacts" that in all criminal proceedings for libel where the defendant has pleaded not guilty, the jurors may give a general verdict on the whole matter, and shall not be required to find the defendant guilty merely on proof of publication, and of the meaning ascribed to the words in the indictment or information (s. 1). Or the jury may in their discretion find a special verdict as in other criminal cases (s. 3). It is still the duty of the judge to direct the jury on all questions of law as in other criminal cases (s. 2), and he may, if he think fit, state his opinion of the document before him. But the question, libel

or no libel, in civil and criminal cases alike, must ultimately be decided by the jury, who are thus constituted "the true guardians of the liberty of the press" (per Fitzgerald, J., in *R. v. Sullivan*, 1868, 11 Cox C. C. at p. 52). As to the respective functions of judge and jury generally, see article JURY.

F. P. A.—These letters stand for "free from particular average," and are usually found in "slips" for policies of marine insurance. They denote that the underwriter is not to be liable for any loss or damage to the subject of insurance which does not amount to an absolute or constructive total loss, or any loss or damage incurred by the subject of insurance for the safety of the common adventure. The words "free from average" are found in the memorandum of the ordinary Lloyds' policy, and have the same meaning; and with regard to the memorandum articles the underwriter exempts himself from liability to make good losses under a certain percentage, unless general, or the ship is stranded (sunk or burnt). It has been held that under such a warranty (as it is called) distinct and separate average losses occurring during the same voyage can be added together so as to ascertain whether the aggregate loss exceeds the percentage, but not such losses as occur during more than one voyage (*Stewart v. Merchants M. I. C.*, 1885, 16 Q. B. D. 619). See AVERAGE; MARINE INSURANCE.

Fraction of a Day.—See DAY; TIME.

Frame Breaking.—See MALICIOUS DAMAGE.

Franchise.—The term franchise is defined by Blackstone (2 Black. Com. 37), following older authorities, as a royal privilege or branch of the king's prerogative in the hands of a subject. It is also said to be synonymous with the term Liberty, though the latter is usually applied to the class of franchises conferring immunities of jurisdiction. Franchises are of various kinds, but have certain features in common. They are all in theory derived from a royal grant, but may in some cases be prescribed for (*Co. Litt.* 114a; 2 *Inst.* 281; Williams, *Rights of Common and other Prescriptive Rights*, p. 2; Cruise, *Digest*, vol. iii. p. 266). A franchise must be granted to certain persons; see, however, *Goodman v. Mayor of Saltash*, 1882, 7 App. Cas. 633. A new franchise must not be granted to the prejudice of an existing one, and this was formerly guarded against by a preliminary inquiry AD QUOD DAMNUM (*q.v.*). When a franchise imposes a charge upon the subject, as of taking toll, it must have a reasonable commencement, that is to say must be founded on a good consideration (*Mayor of Nottingham v. Lambert*, 1738, Willes, 107); and the amount payable must not be out of all proportion to the services rendered (*Stat. Westm.* 1; 3 *Edw. I. c.* 31; 2 *Inst.* 219). "The king is bound by his own and his ancestors' grants, and cannot therefore by his mere prerogative take away vested immunities and privileges" (*Chitty's Prerogative*, 132). A franchise may be forfeited for misuser or abuser or disuser (Cruise, *Digest*, vol. iii. p. 267). A *scire facias* (*q.v.*) to repeal the grant is the proper remedy for the abuse of lawful franchises, a *quo warranto* (*q.v.*) for unlawful usurpations. Franchises may, of course, be abolished by Act of Parliament, and

the question often arises whether the effect of the Act is merely to regulate an old franchise, or to abolish it and create a new right (see the *Manchester Corporation v. Lyons*, 1882, 22 Ch. D. 287; *A.-G. v. Horner*, 1884, 14 Q. B. D. 245; *Taylor v. Mayor and Corporation of Windsor*, 1897, 14 T. L. R. 23).

Much of the learning connected with franchises is now obsolete, but an excellent account of their origin will be found in Pollock and Maitland's *History of English Law*. In mediæval times they were a network of immunities spread over the face of the country, conferring exemptions on the tenants on the Crown lands, or the lords of particular franchises, or particular boroughs, from the county government with the sheriff at its head, and even in many cases from the King's Court itself. The highest franchise of all was that of a county palatine, which conveyed a delegation of almost the entire sovereignty. Such were Chester and Durham, the Duchy of Lancaster, and in earlier times Pembroke and Hexhamshire. The Earls of Chester and Bishops of Durham had their own baronial councils, and the counties had no representatives in Parliament until the reign of Henry VIII. and Charles II. respectively. They had their own Courts where civil and criminal justice was administered in the name of the earl or bishop. They were opened to the justices of assize and officers of the King's Court by 27 Hen. VIII. c. 24, and 32 Hen. VIII. c. 20; but Lancaster and Durham had Courts of Common Pleas of their own until within the last few years, and have still Courts of Chancery. The Isle of Ely was not technically a county palatine, but the franchises of the bishop were scarcely less extensive. They included the administration of civil and criminal justice, until 6 & 7 Will. IV. c. 87, which deprived the bishop of his secular jurisdiction, but still left the Isle in many respects outside the county of Cambridge, an arrangement perpetuated in the Local Government Act, 1888, constituting it an administrative county.

Another franchise is that of holding pleas and trying causes, or the more extensive franchise of consuance of pleas, which gave the exclusive right to try causes arising in the jurisdiction. Such right must, however, be claimed in each case by the bailiff of the Court. The Crown could not establish such a Court of equity, or delegate the power to appoint a judge. The Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76, ss. 107, 108), abolished the chartered criminal and Admiralty jurisdictions in boroughs, but sec. 118 continued the Courts of Record by charter or custom for the trial of civil actions, and provided for making rules to regulate their practice. See also the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), and the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, ss. 175-189).

The return of writs was a widely granted franchise under which the sheriff is excluded and bound to send writs for execution either to the lord or bailiff of the franchise. The sheriff's execution of the writ is not void, but renders him liable to an action at the hands of the owner of the franchise. As to the *non-omittas* clause, and for information on this subject, see Churchill on *Sheriffs*. Liberties of this kind have been annexed to adjoining or surrounding counties for police purposes by 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 8; and provision has been made for uniting them to such counties by 13 & 14 Vict. c. 105. They are merged in such counties for administrative purposes by the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 48).

Another franchise was the right to appoint a coroner, such as was held to pass under the words *attachiamenta de placitis coronæ* in *Jewison v. Dyson*,

1842, 6 St. Tri. N. S. 1. There is a reservation as to franchise coroners in the Coroners Act, 1887 (50 & 51 Vict. c. 71, s. 30).

The lowest and most widely diffused jurisdictional franchise was that of view of frankpledge, now represented by Court Leet, for the presentment of petty offences. (See COURT BARON AND COURT LEET.)

The grant of a corporation with a common seal and perpetual succession is another franchise. Almost the whole constitution of the mediæval towns was made up of franchise; in addition to those already mentioned, they obtained right to elect a mayor and aldermen, to levy murage for mending their walls, pavage for paving the streets, to take tolls for holding fairs and markets, and to be free from such tolls themselves elsewhere, and to make by-laws, and many other privileges. (See BOROUGH.) Some cities were constituted counties of themselves, such as Bristol and Gloucester, and the city of London was a county by prescription. As to the franchises of fairs and markets, see the Report of the Royal Commission on Market Tolls in 1888.

Full information on the franchises connected with real property, of forest, chase, park, free warren, manor, court leet, wreck, estrays, treasure trove, royal fish, free fishery, a hundred, holding fairs and markets, and taking tolls will be found in Cruise, *Digest*, vol. iii. And see generally Chitty's *Prerogative*; Viner, Comyns; and 1 Stephen, *Commentaries*, 635. See also FOREST, LAW OF; WARREN; MANOR; COURT BARON AND COURT LEET; WRECK; ESTRAYS; TREASURE TROVE; FISH, ROYAL; FISHERIES; HUNDRED; MARKETS AND FAIRS; TOLLS.]

Franchise (Electoral).

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INTRODUCTORY.

GENERAL.—The term “franchise,” in its electoral sense, denotes both the right of voting at elections and the qualifications upon which that right is based. In this article it is proposed to set forth, as briefly as possible, an account of the existing law relating to the parliamentary franchise, *i.e.* the right of voting at the elections for the return of members to serve in Parliament, and the various qualifications upon which such right is based.

The present law relating to the subject of the parliamentary franchise is to be found in several statutes dating from the year 1429, and in the numerous judicial decisions upon the construction of their various provisions. The more important of the enactments constituting the present law upon the subject are the Statute 8 Hen. VI. c. 7; the Representation of the People Act, 1832, 2 & 3 Will. IV. c. 45, commonly known as the Reform Act, 1832; the Representation of the People Act, 1867, 30 & 31 Vict. c. 102; and the Representation of the People Act, 1884, 48 & 49 Vict. c. 3.

HISTORY OF THE FRANCHISE.—It is not within the scope of this article to give any detailed historical account of the franchise; for information as to the history of the parliamentary franchise in counties and boroughs reference must be made to the recognised authorities upon constitutional history, and to the authorities mentioned at the end of this article. A brief historical view of the subject is, however, essential to the understanding of the present law. The county franchise was originally vested in the persons who were entitled to attend the Sheriff's County Court, *i.e.* the freeholders of the county. A statute of 1406, 7 Hen. IV. c. 15, required elections to be held in the full County Court (see COUNTY COURTS), and the return to be made by indenture. The first enactment of importance affecting and regulating the county franchise was the Statute 8 Hen. VI. c. 7, which restricted the right of voting at county elections to resident freeholders possessed of freehold land or tenements of the annual value of at least forty shillings.

The county franchise remained practically unaltered from 1429 until 1832. The Representation of the People Act, 1832, left the ancient forty shilling freehold qualification unchanged, but extended the franchise to persons not in occupation, having freeholds of the annual value of £10; to holders of land of copyhold or any other tenure for life or lives or for any larger estate of the annual value of £10; to leaseholders for the unexpired residue of any term originally created for not less than sixty years of the annual value of £10, or of any term originally created for not less than twenty years of the annual value of £50; and to

persons occupying as tenants who were *bona fide* liable to a rental of £50. The Representation of the People Act, 1867, extended the county franchise to persons in occupation as owners or tenants of lands or tenements of the rateable value of £12, and reduced the qualifying value for the franchises under the Act of 1832, in respect of freeholds without occupation, lands of copyhold and other tenure, and leaseholds for sixty years, to £5. The Act of 1867 first introduced the qualifications of rating and payment of rates as incidents of the county franchise.

The Representation of the People Act, 1884, did not affect the property qualifications for the county franchise, but reduced the £12 occupation franchise to £10, thus assimilating it to the occupation franchise as existing in boroughs, extended the existing household and lodger franchise in boroughs to counties, and gave the county (as well as the borough) franchise to persons inhabiting dwelling-houses by virtue of any office, service, or employment.

The early history of the borough franchise is involved in obscurity, and many different theories have been advanced with regard to it. The right of voting at borough elections appears to have been variously vested in different boroughs, either in the freemen of the borough, the holders of tenements in burgage tenure, the householders contributing to *scot and lot*, i.e. local rates, or in the corporation or members of the corporation of the borough. The franchise in the various boroughs was, in fact, regulated by local usage, charters, resolutions of the House of Commons, and sometimes by special Acts of Parliament. The Representation of the People Act, 1832, first placed the borough franchise on a uniform statutory basis by creating an occupation franchise in owners and tenants who occupied houses or other buildings of the annual value of £10, subject to certain conditions as to rating, payment of rates, and residence. Certain of the ancient borough franchises were reserved, some merely temporarily, and others permanently. The Representation of the People Act, 1867, considerably extended the borough franchise by the creation of a household franchise, by which every inhabitant occupier as owner or tenant of any dwelling-house within the borough is, subject to certain conditions as to residence, rating, and payment of rates, entitled to vote. The same Act also introduced a lodger franchise, giving the right to vote to all lodgers who have occupied and resided for a year in lodgings of the unfurnished value of £10. The Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), by definition effected a further extension of this franchise. Lastly, the Representation of the People Act, 1884, as is mentioned above, made the household and lodger franchise uniform in counties and boroughs, assimilated the occupation franchise in counties and boroughs, and introduced the service franchise in counties and boroughs.

The franchises conferred by the Representation of the People Act, 1867, were, by sec. 56 of that Act, declared to be in addition to, and not in substitution for, any existing franchises. The franchises introduced by the Representation of the People Act, 1884, were, on the other hand, declared to be in substitution for those conferred by the enactments repealed by that Act. It may be said, therefore, that the Act of 1884 is the basis of the present law, that statute having effected a wide extension of the franchise, and having repealed and embodied some (though by no means all) of the provisions of the earlier Acts. Many of the provisions of the earlier Acts, including those of 1429, 1832, and 1867, are, indeed, still in force, and have to be read into the Act of 1884. Owing to the gradual legislative extension of the franchise at various periods, but more especially to the method of

legislation adopted, the statute law upon the subject is involved in complexity. A statute consolidating the existing enactments, and incorporating the results of the minute judicial interpretation to which their various clauses have been subjected in the very numerous cases that have been before the Courts, would be of considerable utility in lending perspicuity to the subject.

The qualifications upon which at the present time the right to vote is based are, in short, ownership, occupation, and residence. Formerly, as we have seen, the qualifications for the county franchise differed to a large extent from those for the borough franchise. The tendency of modern legislation appears to have been to assimilate the qualifications giving the right to vote in counties and boroughs. Such assimilation, however, is by no means complete, and in this article it will be convenient to consider the county and borough franchises separately.

REGISTRATION.—By the effect of modern legislation, registration is in all cases a condition precedent to the exercise of the parliamentary franchise. No one is entitled to vote at any election unless his name is duly registered upon the list of voters for the county or borough in respect of which the election is held. For information as to the law relating to the registration of electors, see the article **REGISTRATION**.

The Ballot Act, 1872 (35 & 36 Vict. c. 33, s. 7), provides that a person shall not be entitled to vote unless his name is on the register of voters for the time being in force, and that every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote (see **BALLOT**). This, however, as is expressly provided (see s. 7), does not entitle any person to vote who is prohibited from voting by any statute or by the common law of Parliament. Before considering in detail the proprietary and other qualifications and conditions which are requisite to confer the right of voting, it is well, therefore, to enumerate the various classes of persons who are legally incapacitated for its exercise.

PERSONS DISQUALIFIED FOR THE FRANCHISE.

There are certain persons who, by reason of disqualification, either by the common law or by statute, attaching to themselves personally or as members of a class, are precluded from being registered as electors and from exercising the parliamentary franchise for which in other respects they may be qualified. Thus the Representation of the People Acts of 1832 and 1867 in creating new franchises expressly limit them to male persons of full age and not subject to any legal incapacity (see ss. 19, 20, and 27 of the Act of 1832; ss. 3, 4, 5, and 6 of the Act of 1867). And the Representation of the People Act, 1884, in creating new qualifications for the franchise in no case confers any right to be registered as a voter or to vote on any person who is subject to any legal incapacity (see Representation of the People Act, 1884, s. 10).

ALIENS.—Aliens, *i.e.* persons who are not British subjects, are at common law under a disqualification for voting at parliamentary elections (see *Westminster*, 1698, 12 Com. Journ. 367; *Middlesex*, 1804, 2 Peck. 118). As to who are aliens, what constitutes British nationality, and as to how persons may become naturalised British subjects, see **ALIEN**; **DENIZEN**; **NATIONALITY**; **NATURALISATION**.

WOMEN.—Women are by reason of sex disqualified at common law for voting at parliamentary elections (see 4 *Inst.* 5; *Chorlton v. Lings*, 1868, L. R. 4 C. P. 374; see also the judgments in *Beresford Hope v. Lady Sandhurst*, 1889, 23 Q. B. D. 79; and the article **WOMEN**).

INFANTS.—Persons under the age of twenty-one years are incapacitated for voting by common law (see *Tavistock*, 1691, 10 Com. Journ. 576), and also by statute (7 & 8 Will. III. c. 25, s. 7).

INSANE PERSONS.—Idiots and lunatics are under an incapacity at common law (see *Bedfordshire*, 1785, 2 Lud. 567); but the vote of a lunatic during a lucid interval may be good (*Bridgewater*, 1805, 1 Peck. 108). See **IDIOT**; **LUNACY**.

FELONS.—Persons convicted of treason or felony for which they are under sentence of death, penal servitude, or imprisonment with hard labour or exceeding twelve months, are incapable of exercising any franchise until they have suffered the punishment to which they have been sentenced or such other punishment as by competent authority may be substituted for it, or have received a free pardon (Forfeiture Act, 1870, 33 & 34 Vict. c. 23, s. 1).

CORPORATIONS.—The members of a corporation aggregate, whether it be an ecclesiastical, eleemosynary, or civil corporation, are not entitled to vote in respect of the property of the corporation (see *Middlesex Bail's case*, 1804, 2 Peck. 113; *Wingfield's case*, 1804, *ibid.* 113; *Heath v. Haynes*, 1857, 3 C. B. N. S. 389; *Bulmer v. Norris*, 1864, 9 C. B. N. S. 19; *Acland v. Lewis*, 1864, *ibid.* 32; *Durant v. Kennett*, 1869, L. R. 5 C. P. 262; *Harris v. Phillips*, [1891] 1 Q. B. 267). See **CORPORATION**.

PEERS.—The parliamentary franchise is restricted to commoners. Peers of Parliament are disqualified for voting (see 2 *Inst.* 29; *Winchester*, 1690, 10 Com. Journ. 447; 4 *ibid.* 2, 15; *Malden*, 1699, 13 Com. Journ. 64; 57 Com. Journ. 34; *ibid.* 376; *Earl Beauchamp v. The Overseers of Madresfield*, 1872, L. R. 8 C. P. 245; *Lord Rendlesham v. Haward*, 1873, L. R. 9 C. P. 252).

PERSONS GUILTY OF CORRUPT AND ILLEGAL PRACTICES.—Any person convicted upon indictment of any corrupt practice is incapacitated for seven years from the date of conviction from being registered as a voter and from voting at any parliamentary election (Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, ss. 4 and 6 (3); see also Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. c. 69, s. 2 (d)). And any person convicted upon indictment of any illegal practice is incapacitated for five years from the date of conviction from being registered as an elector or from voting at any parliamentary election within the county or borough in which the illegal practice was committed (Corrupt and Illegal Practices Prevention Act, 1883, s. 10). See **CORRUPT PRACTICES**; **ILLEGAL PRACTICES**. As to similar disqualifications consequent upon the report of an Election Court upon the trial of an election petition, see *ibid.* ss. 11, 19, and 23. See also **CORRUPT PRACTICES**; **ELECTION COMMISSIONERS**; **ELECTION PETITION**; **ILLEGAL PRACTICES**; **RELIEF**.

PERSONS EMPLOYED AT ELECTIONS.—Persons retained or employed for reward by or on behalf of a candidate for the purposes of an election as agent, clerk, messenger, or in any other employment may not vote at such election, and if proved to have voted their votes will be struck off on a scrutiny (see Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 25; see also **SCRUTINY**). A Returning Officer at an election may not vote except to give a casting vote (see Ballot Act, 1872, s. 2; see also **CASTING VOTE**; **RETURNING OFFICER**). A candidate, however, is under no such disability (see *Harwich*, 1808, 1 Peck. 383). As to voting by the police at elections, see the Police Disabilities Removal Act, 1887, 50 & 51 Vict. c. 9, and the Police Disabilities Removal Act, 1893, 56 & 57 Vict. c. 6).

PERSONS RECEIVING PAROCHIAL RELIEF OR ALMS.—The receipt of

parochial relief or alms was at common law a disqualification as affecting the independence of a voter. It is now provided by statute that no one is entitled to be registered in any year as a voter for any city or borough who, within twelve calendar months previous to the 15th July in such year, has received parochial relief or other alms which by the law of Parliament disqualify (Representation of the People Act, 1832, s. 36; Parliamentary and Municipal Registration Act, 1878, s. 7). This disqualification of persons in receipt of parochial relief from being registered as voters for a borough is applied to counties by the Representation of the People Act, 1867, s. 40. As to the disqualification for voting by receipt of alms, see *Smith v. Hall*, 1863, 15 C. B. N. S. 485; *Harrison v. Carter*, 1876, 2 C. P. D. 26; *Edward v. Lloyd*, 1887, 20 Q. B. D. 302; *Daniels v. Allard*, 1887, 1 Fox Reg. 70; *Dix v. Kent*, 1890, *ibid.* 186; *Cowen v. Town Clerk of Kingston-upon-Hull*, [1897] 1 Q. B. 273; 1 Fox Reg. 96).

Certain classes of medical relief, however, are by statute made exceptions to the rule that parochial relief will disqualify (see the Vaccination Act, 1867, 30 & 31 Vict. c. 84, s. 26; the Medical Relief Disqualification Removal Act, 1885, 48 & 49 Vict. c. 46; the Public Health (London) Act, 1891, 54 & 55 Vict. c. 76, s. 80 (4)).

COUNTY FRANCHISE.

PRESENT QUALIFICATIONS.—The county franchise at the present time is based upon qualifications either of (1) *ownership* of freehold, copyhold, or leasehold property of a certain value; or (2) *occupation*, under which head is included the £50 rental franchise, the £10 occupation franchise, and the household and lodger franchise.

(1) **THE OWNERSHIP FRANCHISE.—FREEHOLDS.**—A person is entitled to be registered as a parliamentary elector, and when registered to vote, who is beneficially entitled at law or in equity to (1) a freehold estate of inheritance in lands or tenements of the clear yearly value of forty shillings; or (2) a freehold estate for life or lives in lands or tenements of the clear yearly value of £5, or if he is in actual and *bonâ fide* occupation or if the lands and tenements came to him by marriage, marriage settlement, devise, or promotion to any benefice or any office, of the clear yearly value of forty shillings.

The clear annual value of the estate must be over and above all rents and charges payable out of or in respect of the same.

He must also have been in actual possession or receipt of the rents and profits to his own use for six calendar months next previous to the 15th July in the year in which he is registered, unless the property was acquired by him within that period by descent, succession, marriage, marriage settlement, devise, or promotion to any office or benefice.

See 8 Hen. VI. c. 7; the Representation of the People Act, 1832, ss. 18, 23, and 26; the Parliamentary Voters Registration Act, 1843, 6 & 7 Vict. c. 18, s. 74; and the Representation of the People Act, 1884, s. 4.

As to the meaning and nature of freehold tenure and as to the various classes of freehold interests, see **FREEHOLD**, and the article **ESTATES**.

Clear Yearly Value.—As to the mode of ascertaining the clear yearly value of a freehold, see *Bedfordshire*, *Blackwell's case*, 1785, 2 Lud. 448; *Astbury v. Henderson*, 1854, 15 C. B. 251; as to the deduction of rates and taxes in ascertaining such value, see the Parliamentary Elections Act, 1744, 18 Geo. II. c. 18, s. 6; the Parliamentary Elections Act, 1745, 19 Geo. II. c. 28, s. 5; Representation of the People Act, 1832, s. 21.

Rent-charges.—No person is entitled to be registered as a voter in respect of the ownership of any rent-charge except the owner of the whole tithe rent-charge of a rectory, vicarage, chapelry, or benefice to which an appportionment of tithe rent-charge has been made in respect of any portion of tithes (Representation of the People Act, 1884, s. 4 (1); the rights of persons registered at the date of the passing of the Act are not, however, affected by this provision, see *ibid.* s. 10).

Mortgages.—No mortgagee of lands or tenements is entitled to vote in counties or boroughs by reason of his mortgage unless he is in actual possession or in receipt of the rents and profits, but the mortgagor in actual possession or in receipt of the rents and profits is entitled to vote notwithstanding the mortgage (Parliamentary Voters Registration Act, 1843, s. 74).

Trusts.—A trustee of any lands or tenements has not, in any case, a right to vote by reason of his trust estate therein, but the *cestui-que-trust* in actual possession or in receipt of the rents and profits thereof may vote for the same notwithstanding the trust (*ibid.*).

Equitable Freeholds.—As to what is a sufficient equitable estate in freeholds to confer a vote, see *Simpson v. Wilkinson*, 1844, 7 Man. & G. 50; *Baxter v. Brown*, 1845, *ibid.* 198; *Bulmer v. Norris*, 1860, 9 C. B. N. S. 19; *Freeman v. Gainsford*, 1861, 11 C. B. N. S. 68; *Steele v. Bosworth*, 1864, 18 C. B. N. S. 22; *Roberts v. Percival*, 1864, *ibid.* 36; *Freeman v. Gainsford*, 1865, *ibid.* 185; *Simey v. Marshall*, 1872, L. R. 8 C. P. 269; *Watson v. Black*, 1885, 16 Q. B. D. 270; *Harris v. Phillips*, [1891] 1 Q. B. 267.

Fraudulent Conveyances.—As to the effect of fraudulent conveyances of freeholds for the purpose of creating votes, see FAGGOT VOTE.

Joint Owners.—Where two or more persons are owners as joint-tenants or tenants in common, one only of them is entitled to be registered as a voter, and when registered to vote at an election. But where such owners have derived their interest by descent, succession, marriage, marriage settlement, or will, or where they occupy the land or tenement, and are *bond fide* engaged as partners carrying on trade or business thereon, each of them whose interest is sufficient to confer on him a qualification as a voter is entitled to be registered as a voter in respect of such ownership, and when registered to vote at an election (Representation of the People Act, 1884, s. 4 (2)). The value of the interest of each such owner where not otherwise legally defined is to be ascertained by the division of the total value of the land or tenement equally among the whole of such owners (*ibid.*). These provisions as to joint owners apply to copyholds and leaseholds as well as to freeholds.

COPYHOLDS, ETC.—A person is entitled to be registered as a parliamentary elector, and when registered to vote, who is beneficially entitled at law or in equity to an estate for life or lives or any larger estate in lands or tenements of copyhold or any other customary tenure of the clear yearly value of £5 over and above all rents and charges payable out of or in respect of the same (see the Representation of the People Act, 1867, s. 5).

He must have been in actual possession or receipt of the rents and profits to his own use for six calendar months next previously to the 15th of July in the year in which he is registered, unless the property was acquired by him within that period by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice or any office (see the Representation of the People Act, 1832, s. 26; Representation of the People Act, 1867, s. 5).

No one is, however, entitled to vote for a county in respect of tenements of copyhold or other customary tenure situate in a borough which would

confer a vote for the borough (see Representation of the People Act, 1832, s. 25; Representation of the People Act, 1867, s. 59).

As to the nature of copyhold and other customary tenures, see ANCIENT DEMESNE; COPYHOLD; CUSTOMARY FREEHOLD.

LEASEHOLDS.—A person is entitled to be registered as a parliamentary elector, and when registered to vote, who, on the 15th July in the year in which he is registered, is entitled either at law or in equity as lessee, sub-lessee (see *Chorlton v. The Overseers of Stretford*, 1871, L. R. 7 C. P. 198), or assignee to, and if as sub-lessee or assignee of any underlease, has been in actual occupation of, any lands or tenements of freehold or of any other tenure, either (1) for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than £5 over and above all rents and charges payable out of or in respect of the same; or (2) for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years, of the clear yearly value of £50 over and above all rents and charges payable out of or in respect of the same (see Representation of the People Act, 1832, s. 20; Representation of the People Act, 1867, ss. 5, 56, and 59). He must also have been in actual possession or receipt of the rents and profits of such lands or tenements to his own use for the whole of the twelve calendar months next previous to the 15th of July in the year in which he is registered, unless such lands or tenements came to him within such twelve months by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice or to any office (see Representation of the People Act, 1832, s. 26; Representation of the People Act, 1867, ss. 56 and 59).

No one, however, is entitled to vote for a county in respect of leasehold tenements situate in a borough which would confer a vote for the borough (see Representation of the People Act, 1832, s. 25; Representation of the People Act, 1867, s. 59; *Chorlton v. Johnson*, *Bunting's case*, 1868, L. R. 4 C. P. 426; but see *Webb v. The Overseers of Aston*, 1843, 5 Man. & G. 14).

As to the nature of leasehold property, see LEASEHOLD; see also SUBLEASE; UNDERLEASE.

In order to constitute a qualification, the leasehold tenement must be such as is capable of actual occupation. A rent-charge, therefore, is not sufficient (see *Warburton v. The Overseers of Denton*, 1870, L. R. 6 C. P. 267; see also *Chorlton v. The Overseers of Stretford*, 1871, L. R. 7 C. P. at p. 200).

(2) **OCCUPATION FRANCHISE. — FIFTY POUNDS RENTAL.**—A person is entitled to be registered as a parliamentary elector in a county, and when registered to vote, who, on the 15th July in the year in which he is registered, is an occupier as tenant of some land or tenement for which he is *bona fide* liable to a yearly rent of not less than £50 (see Representation of the People Act, 1832, s. 20; Parliamentary and Municipal Registration Act, 1878, s. 7; Registration Act, 1885, s. 12). Such land or tenement must have been occupied by him for the whole of the twelve months immediately preceding the said 15th July (see Representation of the People Act, 1832, s. 26; Parliamentary and Municipal Registration Act, 1878, s. 7; Registration Act, 1885, s. 12). And he must have been registered as an elector in respect of such occupation in the register of electors in force during the year 1884 (Parliamentary Registration Act, 1843, s. 73; Representation of the People Act, 1884, ss. 10, 12, and Sched. II. Part I.).

This qualification now only exists with regard to persons who were

registered in respect of it at the date of the passing of the Representation of the People Act, 1884.

TEN POUNDS OCCUPATION.—A person is entitled to be registered as a parliamentary elector in a county who, on the 15th July in the year in which he is registered, is, and during the whole twelve months immediately preceding that day has been, an occupier as owner or tenant of some land or tenement within the county of the clear yearly value of not less than £10 (see Representation of the People Act, 1867, s. 6; Representation of the People Act, 1884, ss. 5, 11, and 12). During such twelve months he or some other person must have been rated to all the poor-rates made in respect of such land or tenement, and all sums due in respect of such land or tenement on account of any poor-rate made and allowed during the twelve months immediately preceding the 5th of January in the year in which such person is registered must have been paid on or before the following 20th of July (see Representation of the People Act, 1867, s. 6; Representation of the People Act, 1884, ss. 5, 11, and 12).

But no one is entitled to vote for a county in respect of the occupation of any land or tenement situate in a borough (Representation of the People Act, 1884, s. 6).

Joint Occupiers.—Where two or more persons jointly are such occupiers, and the clear yearly value of the land or tenement is such as to give £10 or more for each occupier, two of such occupiers are entitled to be registered as electors; but no more are entitled to be registered, unless they derived the property by descent, succession, marriage, marriage settlement, or devise, or unless they are *bona fide* engaged as partners carrying on any trade or business thereon, in any of which cases all may be registered if the clear yearly value is sufficient to give £10 for each occupier (see Representation of the People Act, 1867, s. 27; Representation of the People Act, 1884, ss. 5, 11, and 12).

Successive Occupations.—Different premises occupied in immediate succession by any person as owner or tenant during the said twelve months will have the same effect in qualifying him to vote as a continued occupation of the same premises (see Representation of the People Act, 1867, s. 26; Representation of the People Act, 1884, ss. 5, 11, and 12).

(3) **HOUSEHOLD AND LODGER FRANCHISE.**—A uniform household franchise and a uniform lodger franchise were established in all counties, as well as in boroughs, by the Representation of the People Act, 1884. Previously under the Representation of the People Act, 1867, these franchises existed only in boroughs. Every person possessed of a household qualification or a lodger qualification is, if the qualifying premises are situate in a county, entitled to be registered, and when registered to vote at an election for such county (Representation of the People Act, 1884, s. 2). No one, however, is entitled to be registered as a voter or to vote at any election for a county in respect of the occupation of any dwelling-house, lodgings, land, or tenement situate in a borough (*ibid.* s. 6).

"A household qualification" means, as respects England, the qualification enacted by the Representation of the People Act, 1867, s. 3, and the enactments amending or affecting the same which are now extended to counties in England; and "a lodger qualification" means the qualification enacted as respects England by sec. 4 of the same Act, and the enactments amending or affecting the same which now are extended to counties in England (Representation of the People Act, 1884, s. 7 (1) and (3)).

The household and lodger franchises will be more conveniently considered in detail under the head of the BOROUGH FRANCHISE.

BOROUGH FRANCHISE.

PRESENT QUALIFICATIONS.—The borough franchise at the present time is based upon the following qualifications:—(1) The qualification as an occupier of lands or tenements of the clear yearly value of £10; (2) the qualification as a householder; (3) the qualification as a lodger; and (4) certain ancient franchises which existed previously to, and are expressly reserved by, the Representation of the People Act, 1832.

(1) **TEN POUNDS OCCUPATION FRANCHISE.**—A person is entitled to be registered as a parliamentary voter in a borough, and when registered to vote, who, during the whole twelve months immediately preceding the 15th July in the year in which he is registered, has been an occupier as owner or tenant of some land or tenement within the borough of the clear yearly value of not less than £10, and who has resided in or within seven miles of the borough during six months immediately preceding the 15th July in the same year. He or some other person must, during the said twelve months, have been rated to all poor-rates made in respect of such land or tenement, and all sums due in respect of said land or tenement on account of any poor-rate made and allowed during the twelve months immediately preceding the 5th January in the year in which such person is registered, or on account of any assessed taxes due before the said 5th January, must have been paid on or before the following 20th July (see the Representation of the People Act, 1832, s. 27; Parliamentary Elections Act, 1848, 11 & 12 Vict. c. 90; Poor Rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, s. 19; Parliamentary and Municipal Registration Act, 1878, ss. 7 and 14; Representation of the People Act, 1884, ss. 5, 8, and 11).

As to what amounts to occupation, see *Nunn v. Denton*, 1844, 7 Man. & G. 66; *Daniel v. Coulsting*, 1845, *ibid.* 122; *Downing v. Luckett*, 1847, 5 C. B. 40; *Watson v. Cotton*, 1847, *ibid.* 51; *Joliffe v. Rice*, 1848, 6 C. B. 1; *Powell v. Farmer*, 1865, 18 C. B. N. S. 169; *Morish v. Harris*, 1865, L. R. 1 C. P. 155; *Piercy v. Maclean*, 1870, L. R. 5 C. P. 252. As to the principles upon which the value of a tenement occupied by a person as tenant is to be ascertained, see *Coogan v. Luckett*, 1846, 2 C. B. 182; *Colville v. Wood*, 1846, *ibid.* 210; see also *R. v. Mayor of Kidderminster*, 1851, 20 L. J. Q. B. 281.

Occupation of different Premises.—The premises in respect of the occupation of which such person is entitled to be registered and to vote are not required to be the same premises, but may be different premises occupied in immediate succession by him during the twelve months immediately preceding the 15th July in the year in which he is registered, he having paid on or before the 20th July all the poor-rates and assessed taxes which previously to the 5th of January in the same year have become payable from him in respect of all such premises so occupied by him in succession (see Representation of the People Act, 1832, s. 28; Representation of the People Act, 1884, ss. 5 and 11).

Joint Occupiers.—Where the premises are jointly occupied by more persons than one as owners or tenants, each of such joint occupiers is entitled to vote in the election for the city or borough in respect of the premises so jointly occupied, if the clear yearly value of the premises is of an amount which when divided by the number of such occupiers gives a sum of not less than £10 for each such occupier, but not otherwise (see Representation of the

People Act, 1832, s. 29; Representation of the People Act, 1884, ss. 5 and 11; see also *Druitt v. Gossling*, 1888, 58 L. J. Q. B. 109; *Burnside v. Chambers*, 1887, 22 L. R. Ir. 255; *Jones v. Pritchard*, 1891, 1 Fox Reg. 259; *Mooney v. Chambers*, 1894, 2 Ir. Rep. 374; *Bagley v. Butcher*, 1897, 14 T. L. R. 57).

Residence.—As to what constitutes residence, see *Whithorn v. Thomas*, 1844, 7 Man. & G. 1; *Ford v. Hart*, 1873, L. R. 9 C. P. 273; *Durant v. Carter*, 1873, *ibid.* 261; *Ford v. Pyc*, 1873, *ibid.* 269; *Ford v. Drew*, 1879, 5 C. P. D. 59; *Beal v. The Town Clerk of Exeter*, 1887, 20 Q. B. D. 300; *Barlow v. Smith*, 1892, 1 Fox Reg. 293. See also the House Occupiers Disqualification Removal Act, 1878, 41 & 42 Vict. c. 3; and the Electoral Disabilities Removal Act, 1891, 54 & 55 Vict. c. 11.

(2) THE HOUSEHOLD FRANCHISE.—A person is entitled to be registered as a parliamentary elector in a borough, and when registered to vote, who, on the 15th July in the year in which he is registered, is, and for the whole of the twelve months immediately preceding that day has been, an inhabitant occupier as owner or tenant of some dwelling-house within the borough or of some part of a house within the borough separately occupied as a dwelling. He or someone else must during those twelve months have been rated to all poor-rates made in respect of the said dwelling-house, and all sums due in respect of the said dwelling-house on account of any poor-rate made and allowed during the twelve months immediately preceding the 5th January in the year in which such person is to be registered must have been paid on or before the following 20th of July (see Representation of the People Act, 1867, s. 3; Poor Rate Assessment and Collection Act, 1869, s. 19; Parliamentary and Municipal Registration Act, 1878, ss. 5, 7, and 14).

A person is entitled to be registered and to vote in respect of the household qualification, notwithstanding that during a part of the qualifying period not exceeding four months in the whole, he has, by letting or otherwise, permitted the qualifying premises to be occupied as a furnished house by some other person (House Occupiers Disqualification Removal Act, 1878, s. 2; see also the Electoral Disabilities Removal Act, 1891).

Occupation of different Premises.—Different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the 15th July in any year will have the same effect in qualifying such person for the vote as a continued occupation of the premises would have had (see Representation of the People Act, 1867, s. 26; see also Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, ss. 10 and 17; *Down v. Steele*, 1885, 55 L. J. Q. B. 36).

Joint Occupiers.—No one is entitled to be registered as a voter in respect of the household qualification by reason of his being a joint occupier of any dwelling-house (Representation of the People Act, 1867, s. 3; see, however, *Brewer v. McGowen*, 1869, L. R. 5 C. P. 239; see also *Torish v. Love*, 1894, 2 Ir. Rep. 372). But where an occupier is entitled to the sole and exclusive use of any part of a house, that part is not deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part (see Parliamentary and Municipal Registration Act, 1878, s. 5). And if the dwelling-house inhabited by joint occupiers is of sufficient value they may be entitled to be registered in respect of a ten pounds occupation qualification, though they cannot be registered or vote as inhabitant householders (see *Druitt v. Gossling*, 1888, 58 L. J. Q. B. 109).

Service Franchise.—When a man himself inhabits any dwelling-house by

virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom he serves in such office, service, or employment, he is deemed to be an inhabitant occupier of such dwelling-house as a tenant, and is therefore entitled to be registered as a voter in respect of the household franchise (see Representation of the People Act, 1884, s. 3). This branch of the household qualification is usually known as the service franchise; the decisions with regard to it are numerous, and it is impossible here to collect them, but reference should be made to *Stribbling v. Halse*, 1885, 16 Q. B. D. 246; *Atkinson v. Collard*, 1885, *ibid.* 254; *Hasson v. Chambers*, 1885, 18 L. R. Ir. 68; *Torish v. Clark*, 1885, *ibid.* 285; *Spittal v. Brook*, 1886, 1 Fox Reg. 22; *Alexander v. Burke*, 1887, 22 L. R. Ir. 443; *Nicholson v. Yeoman*, 1889, 24 Q. B. D. 145; *Barnett v. Hickmott*, [1895] 1 Q. B. 691; *Clutterbuck v. Taylor*, [1896] 1 Q. B. 395.

(3) THE LODGER FRANCHISE.—A person is entitled to be registered as a voter in a borough, and when registered to vote, who has occupied separately as a lodger for the twelve months immediately preceding the 15th July in the year in which he is registered, lodgings, being part of one and the same dwelling-house within the borough, and being of a clear yearly value if let unfurnished of £10 or upwards, and has resided in such lodgings during such twelve months, and has claimed to be registered as a voter (see Representation of the People Act, 1867, s. 4; Parliamentary and Municipal Registration Act, 1878, ss. 5 and 7).

The peculiarity of the lodger franchise is that it is based upon the personal contractual relation subsisting between lodger and landlord, the lodger strictly having no right of property in the premises (see *Ancketill v. Baylis*, 1882, 10 Q. B. D. 587; see also *Bradley v. Baylis*, 1881, 8 Q. B. 1). 195; *Bennett v. Evans*, 1892, 1 Fox Reg. 291).

The term "lodgings" includes any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house; and the term "dwelling-house" includes any part of a house where that part is separately occupied as a dwelling (see Parliamentary and Municipal Registration Act, 1878, s. 5).

Where an occupier is entitled to the sole and exclusive use of any part of a house, that part is not deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part (*ibid.*; see also *Kelly v. Chambers*, *Gilliland's case*, 1890, 28 L. R. Ir. 289; *Gallagher v. Hay*, 1892, 32 L. R. Ir. 166).

Additional Lodgings.—Lodgings occupied by a person in any year or two successive years are not deemed to be different lodgings by reason only that in that year, or in either of those years, he has occupied some other rooms or place in addition to his original lodging (Parliamentary and Municipal Registration Act, 1878, s. 6 (1)).

Successive Lodgings in same House.—For the purpose of qualifying a lodger to vote, the occupation in immediate succession of different lodgings of the requisite value in the same house has the same effect as continued occupation of the same lodgings (*ibid.* s. 6 (2)).

Joint Occupation of Lodgings.—Where lodgings are jointly occupied by more than one lodger, and the clear yearly value of the lodgings if let unfurnished is of an amount which when divided by the number of the lodgers gives a sum of not less than £10 for each lodger, then each lodger, if otherwise qualified, is entitled to be registered, and when registered to vote as a lodger. But not more than two persons being joint lodgers are entitled to be registered in respect of such lodgings (*ibid.* s. 6 (3)).

Residence.—As to what is sufficient residence to confer the franchise, see *Taylor v. The Overseers of St. Mary Abbots*, 1870, L. R. 6 C. P. 309; *Bond v. The Overseers of St. George's, Hanover Square*, 1870, *ibid.* 312; *Kelly v. Chambers*, *M'Vicker's case*, 1887, 21 Ir. L. T. R. 67; *Kelly v. Chambers*, *M'Connell's case*, 1890, 28 L. R. Ir. 292.

Claim.—In the absence of a claim to be registered as a lodger, the lodger franchise cannot be acquired (see *Cullen v. Patterson*, 1885, 18 L. R. Ir. 274; *Hersant v. Halse*, 1886, 18 Q. B. D. 412; *Jones v. Beveridge*, 1886, 20 L. R. Ir. 383; *Jones v. Kent*, 1888, 22 Q. B. D. 204; see also *Hanbridge v. Beveridge*, 1889, 26 L. R. Ir. 423).

(4) ANCIENT FRANCHISES RESERVED BY THE ACT OF 1832.—Certain ancient franchises which were in existence at the time of the passing of the Representation of the People Act, 1832 (*i.e.* the 7th June 1832), were expressly reserved by the provisions of that Act.

The franchises conferred by the Representation of the People Act, 1867, were in addition to, and not in substitution for, any existing franchises (see s. 56 of the Act of 1867). The franchises conferred by the Representation of the People Act, 1884, were, however, in substitution for those conferred by the enactments repealed by that Act (see s. 12 of the Act of 1884); but the rights of voters already registered were preserved (see *ibid.* s. 10). So that persons are still entitled to be registered as electors in respect of the ancient franchises reserved by the Act of 1832. It is, however, expressly provided that, where the previous qualification is also a qualification under the Act of 1884, the voter is entitled to be registered in respect of the latter franchise only (see s. 10 of the Act of 1884).

Of the various ancient franchises reserved by the Representation of the People Act, 1832, some were reserved permanently and others merely temporarily.

FRANCHISES TEMPORARILY RESERVED.—Thus the right of voting at elections of members for cities or boroughs was temporarily reserved to freemen who had been or were entitled to be admitted for any cause on the 1st March 1831, and persons claiming by birth through them (see Representation of the People Act, 1832, s. 32; see also *Gaydon v. Bencraft*, 1864, 18 C. B. N. S. 11); to freeholders or burgage tenants who were entitled to vote on the 1st March 1831, or had acquired the estate between the 1st March 1831 and the 7th June 1832 by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice or office (*ibid.* ss. 33 and 35); and to electors who were at the time of the passing of the Act qualified in respect of residency, as inhabitants generally, as inhabitant householders (as to the meaning of the term "householder," see *Cirencester*, 1792, 2 Fras. at p. 449), as inhabitants paying scot and lot (see *Milborne*, 1775, 1 Doug. Elect. 129; see also SCOT AND LOT), or as "potwallers" (see as to the meaning of this term, *Taunton (Curry's case)*, 1838, Falc. & Fitz. 311; *Allen v. House*, 1845, 7 Man. & G. 157; see also POTWALLER). See the Representation of the People Act, 1832, s. 33. Such persons must have retained their rights (see *Jeffrey v. Kitchener*, 1845, 7 Man. & G. 99); and must be qualified as electors according to the usages and customs of the city or borough, or any law in force at the time of the passing of the Act of 1832 (see Representation of the People Act, 1832, s. 33; see also 26 Geo. III. c. 100). As to the effect of the names of such persons being omitted from the register of voters, see the Parliamentary Voters Registration Act, 1843, s. 78; see also *Nicks v. Field*, 1846, 1 Lut. 566.

These franchises, which are personally reserved, are, owing to lapse of time, of constantly decreasing importance, and it is not proposed here to treat of them in further detail.

FRANCHISES PERMANENTLY RESERVED.—*Freeholders and Burgage Tenants.*—The Act of 1832 reserves the right of voting in cities and towns which are counties of themselves to freeholders and burgage tenants who have estates of inheritance; and to freeholders and burgage tenants who have estates for life or lives of which they were seised at the time of the passing of the Act, *i.e.* 7th June 1832; or which they acquired subsequently thereto by marriage, marriage settlement, devise, or promotion to any benefice or office; or of which they are in the actual and *bona fide* occupation; or which are of the clear yearly value of not less than £10 (see Representation of the People Act, 1832, ss. 18 and 31).

As to the meaning and incidents of burgage tenure, see the article **BURGAGE**.

The cities and towns being counties of themselves, in which freeholders are, therefore, at the present time entitled to this reserved franchise, are by the effect of various legislation restricted to Bristol, Exeter, Norwich, and Nottingham (see Representation of the People Act, 1832, s. 17 and Sched. G.; Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, s. 2 and Sched. I. Part II.; see also *Nottingham*, 1701, 13 Com. Journ. 611).

Freemen and Burgesses.—The ancient franchise in respect of cities and boroughs is also reserved to freemen and burgesses by servitude, and to persons claiming by birth through them in the case of towns in which such qualifications existed before the Act of 1832, and in the city of London to freemen and liverymen (see Representation of the People Act, 1832, s. 32).

The right of being a freeman by servitude is usually acquired by apprenticeship to a freeman for a certain number of years; such person on being admitted to the company or guild of the particular trade has an inchoate right to the freedom of the city or borough (see *R. v. Marshall*, 1787, 2 T. R. 2; *Lichfield (Chiddow's case)*, 1842, Bar. & Aust. 344; *Guildford (Yalden's case)*, 1710, 16 Com. Journ. 477; see also **BURGESS**; **FREEMAN**; **GUILD**). The right to freedom by birth depends upon custom. For a person to be entitled to the franchise as a freeman by birth he must derive his right from or through some person who was a freeman or burgess, or entitled to be admitted as such before 1st March 1831, or who had since that date become a freeman or burgess by servitude (see Representation of the People Act, 1832, s. 32; see also *Gaydon v. Bencraft*, 1864, 18 C. B. N. S. 11; *Gale v. Chubb*, 1846, 1 Lut. 544).

In the case of elections for the city of London every freeman of the city is, by the effect of the reservations contained in sec. 32 of the Act of 1832, entitled to vote who is also a liveryman in one of the city companies. But freemen and liverymen of the city of London to be entitled to vote must have been upon the livery for twelve months before the election, and have paid their livery fines (see 11 Geo. I. c. 18, s. 14). See also **FREEMAN**; **LIVERYMAN**; **COMPANIES, CITY**.

CONDITIONS AS TO REGISTRATION AND RESIDENCE.—In the case of all the franchises reserved by the Representation of the People Act, 1832, certain conditions are imposed, the fulfilment of which is essential to the exercise of the franchise. Firstly, the person entitled to the franchise must be duly registered as a voter (see **REGISTRATION**); and, secondly, he must have resided for six calendar months next previous to the 15th July in the year of his registration within the city or borough or within seven statute miles thereof or of any part thereof, or in the case of the city of

London within twenty-five miles. See the Representation of the People Act, 1832, ss. 31–33 and Sched. E. 2; Representation of the People Act, 1867, s. 46; Parliamentary and Municipal Registration Act, 1878, s. 7. As to the measurement of the prescribed distance, see the Parliamentary Voters Registration Act, 1843, s. 76.

UNIVERSITY FRANCHISE.

OXFORD.—The persons who are entitled to vote at elections of members to serve in Parliament for the University of Oxford are the members of the Convocation of the University.

CAMBRIDGE.—The franchise in respect of elections for members to serve in Parliament for the University of Cambridge is vested in the members of the Senate of the University.

LONDON.—The right of voting at the election of a member to serve in Parliament for the University of London belongs to every man whose name is for the time being on the register of graduates constituting the Convocation of the University, and who is of full age and not subject to any legal incapacity (see Representation of the People Act, 1867, s. 25).

SUMMARY OF FRANCHISES.

It may be useful here to summarise in tabular form the various classes of persons who, if registered, if they are in other respects under no legal incapacity, and if the various conditions as to residence, rating, payment of rates, etc., which are required in certain cases, have been fulfilled, are entitled to the franchise.

TABLE OF PERSONS ENTITLED TO THE PARLIAMENTARY FRANCHISE.

At County Elections.

1. Freeholders seised of an estate of inheritance of 40s. annual value.
2. Freeholders for life or lives, seised of an estate of 40s. annual value, who actually occupy, or were seised on 7th June 1832, or who acquired their estate after that date by marriage, marriage settlement, devise, or promotion to a benefice or office.
3. Persons seised for life or lives of lands or tenements of any tenure of annual value of £5.
4. Leaseholders: leases originally for sixty years, value £5 yearly; leases originally for twenty years, value £50 yearly.
5. Occupiers of lands or tenements of £10 clear yearly value.
6. Inhabitant householders, including persons who occupy by virtue of office, service, or employment.
7. Lodgers.

At Borough Elections.

1. Occupiers of lands or tenements of £10 clear yearly value.
2. Inhabitant householders, including persons who occupy by virtue of office, service, or employment.
3. Lodgers.
4. Persons qualified under franchises reserved by the Act of 1832, including freeholders, burgage tenants, freemen; and in the City of London, freemen and fivorymen, etc.

At University Elections.

1. Members of the Convocation of the University of Oxford.
2. Members of the Senate of the University of Cambridge.
3. Members of the Convocation of the University of London.

THE FRANCHISE AT MUNICIPAL AND OTHER ELECTIONS.

GENERAL.—For information as to the qualifications of voters for the exercise of the franchise at municipal and other elections, reference should be made to the following articles:—COUNTY COUNCIL; DISTRICT COUNCIL; GUARDIANS; MUNICIPAL COUNCIL; PARISH COUNCIL; SCHOOL BOARD; REGISTRATION.

See also BALLOT; CORRUPT PRACTICES; ELECTION COMMISSIONERS; ELECTION PETITION; ELECTIONS; ILLEGAL PRACTICES; REGISTRATION; RETURNING OFFICER; REVISING BARRISTER; SCRUTINY; etc.

[*Authorities.*—Prynne, *Register of Parliamentary Writs*, 1659, 2 vols.; Browne Willis, *Notitia Parliamentaria*, 2nd ed., 1730, 3 vols.; Carew, *Historical Account of the Rights of Elections of the several Counties, Cities, and Boroughs of Great Britain*, 1755; Whitelocke on the *King's Writ for Choosing Members of Parliament*, 1766, 2 vols.; Simeon, *Treatise on the Law of Elections*, 2nd ed., 1795; Heywood, *Law of Borough Elections*, 1797; Heywood, *Law of County Elections*, 2nd ed., 1812; Orme, *Digest of the Election Laws*, 2nd ed., 1812; Oldfield, *The Representative History of Great Britain and Ireland*, 1816, 6 vols.; Roe, *Law of Elections*, 2nd ed., 1818, 2 vols.; Anson, *Law and Custom of the Constitution*, Part I., "Parliament," 3rd ed., 1897; Mackenzie and Lushington, *Registration Manual*, 2nd ed., 1897; Rogers on *Elections*, vol. i., "Registration," 16th ed., 1897.]

Francisation, Acte de — The French equivalent of the certificate of registry delivered to British ships, a term met with in maritime cases in our Courts. All French ships, whatever their tonnage, are required to be provided with this document, which relates the origin of the vessel, gives its measurements, describes it, and states that the document is delivered for the purpose of granting the right of navigating under the French flag. It implies seaworthiness.

Franconia Case, officially entitled *R. v. Keyn*, 1876 (2 Ex. D. 63, and 46 L. J. Rep. M. C. 17), a case involving the jurisdiction of the British Crown over British territorial waters (see TERRITORIAL WATERS). The facts of the case were as follow:—Keyn was a German in command of a German ship called the *Franconia*, which, while passing within three miles of the shore of England, on a voyage to a foreign port, ran into the *Strathclyde*, a British ship, and sank her; a passenger on board the latter being drowned. On these facts Keyn was indicted at the Central Criminal Court for manslaughter. It was alleged and found that the collision was due to the negligence of the prisoner.

The question whether the Court had jurisdiction to try the case was reserved for determination by the Court for the consideration of CROWN CASES RESERVED.

The contention of the prisoner was, that inasmuch as he was a foreigner, in a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any Court in this country. The contrary position maintained on the part of the Crown was, that inasmuch as at the time of collision both vessels were within the distance of three miles from the English shore, the offence was committed within the realm of

England, and triable by the English Court (per Sir R. Phillimore). The question which the Court had to decide was whether the locality of the offence was within English territory, or what amounted to the same thing, within the dominion or sovereignty of England (per Amphlett, J.A.). 4 & 5 Will. IV. c. 36 (1834), s. 22, transferred the Admiralty jurisdiction over "persons charged with certain offences committed on the high seas, and other places within the jurisdiction of the Admiralty of England," to the then new Central Criminal Court.

The ground of the jurisdiction of the Central Criminal Court, therefore, was that the offence was committed on the high seas.

It was held by the majority of the Court, consisting of Cockburn, C.J., Kelly, C.B., Bramwell, J.A., Lush and Field, JJ., Sir R. Phillimore, and Pollock, B. (the minority including Lord Coleridge, Brett and Amphlett, JJ.A., Grove, Denman, and Lindley, JJ.), that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged. The decision was based partly upon the ground that prior to 28 Hen. VII. c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, that this and the subsequent statutes only transferred to the common law Courts and the Central Criminal Court the jurisdiction formerly possessed by the admiral, and that therefore in the absence of statutory enactment, as stated by the Lord Chief Justice, the Central Criminal Court had no power to try such an offence (by Kelly, C.B., and Sir R. Phillimore). This judgment led to the adoption of the express legislation to the absence of which Cockburn, L.C.J., had, in his judgment, referred. By the Territorial Waters Jurisdiction Act (41 & 42 Vict. c. 73, 1878) it was enacted that an offence committed by any person on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the admiral's jurisdiction, although committed on board or by means of a foreign ship (see TERRITORIAL WATERS).

Frankalmoign—A spiritual tenure, otherwise known as *libera elemosyna* or free alms. It arose before the Statutes of Edward I. (viz. 7 Edw. I. c. 1 and 18 Edw. I. c. 1) prohibited alienation of land to charities (see vol. ii. p. 457). The Statute 12 Car. II. c. 24, in destroying the other ancient tenures, expressly provided "that nothing therein contained should take away or be construed to take away tenures in frankalmoign" (s. 7); it is therefore still a subsisting tenure. "Tenure in frankalmoign . . . is that whereby a religious corporation aggregate or sole holdeth lands of the donor to them and their heirs for ever" (Litt. sec. 133 in 2 Black. Com. p. 101). Fealty, which was the principal incident of temporal tenures, was not an incident of this, but instead of fealty and the ordinary secular service to the lord, the service of this tenure was spiritual only, and at the same time vague and undefined.

The tenant in frankalmoign was bound religiously to pray for the souls of the granters, and the grants were often expressly made "in consideration of the said service of prayers." At times, too, an undertaking to bury the donor in the donee's church formed part of the consideration. It is to be noticed also that the gifts in frankalmoign were in their terms made not to the abbot, or the monks, but to God, e.g., a gift to Ramsey Abbey would in form be to "God and St. Benet of Ramsey, and the Abbot Walter and the monks of St. Benet" (quoted in Pollock and Maitland's *Hist. Eng. Law*, vol. i. p. 222). And the old books describe frankalmoign as

"when lands and tenements were bestowed upon God (that is) given to such people as are consecrated to the service of God" (Bracton, lib. 2, cc. 5 and 10, quoted in *Co. Lit.* 94 b). Though the tenants in frankalmoign were before God (*i.e.* by the ecclesiastical law) to do their divine service, the lord could not if they failed in their service come upon the land to enforce it. His remedy was to lay a complaint before the superior and ask him to interfere. This absence of any direct remedy in the hands of the lord himself at common law is due to the vagueness and uncertainty, already noticed, in the nature of the service to be rendered.* It is this incident of uncertainty in the service that distinguishes frankalmoign from "tenure by divine service" where the nature of the service is defined as, *e.g.*, to sing a mass for the donor's soul every Friday in the week, and if such divine service be not done the lord has his remedy by coming upon the land. The subject is exhaustively treated in Pollock and Maitland's *Hist. Eng. Law*, vol. i. at pp. 218-230.

Frankchase.—" 'Libera chasea' is a liberty of free chase whereby all men having ground within that compass are prohibited to cut down wood, etc., without the view of the forester, though it be in his own demesnes" (Cowell, *Law Dict.*). By all men, of course, is meant all other than he who has the liberty.

Frankfee.—Land held by any man at common law to himself and his heirs—"land pleadable at common law" (2 Black. *Com.* 368).

"The lands which were in the hands of King Edward the Confessor at the making of Domesday-book is ANCIENT DEMESNE; all the rest of the realm is called frankfee" (Reg. Orig. 12, quoted by Cowell). The tenant in frankfee had not to do any service to the lord. The term is used in contradistinction to copyhold.

Frankferm.—"Lands and tenements whereof the nature of the fee is changed by feoffment out of chivalry for certain yearly services and in respect whereof neither homage, ward, marriage, nor relief can be demanded" (Britton *apud* 2 Black. *Com.* 80). The reduction of tenure by knight service to frankferm or tenure by socage was of course of great advantage to the tenant.

Frankfoldage.—The liberty of the lord to "fold" his tenants' sheep as well as his own within his manor, *i.e.* setting up folds for the sheep in any fields within the manor for the purposes of manuring them.

Frankmarriage.—Tenure in frankmarriage is a tenure in estate tail special; called also an estate *in libero maritagio*. These estates are now obsolete, though not invalid. It arises "where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmarriage, the which gift hath an inheritance by these words (frankmarriage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heirs between them two begotten. And

this is called *special taile*, because the issue of the second wife may not inherit" (Litt. s. 17).

* The word frankmarriage, therefore, was sufficient, *ex vi termini*, not only to create but to limit the inheritance, and the words "the heirs of their bodies" need not be used. The tenants in frankmarriage were exempt from all service except fealty; and a reserved rent thereon would be void till the respective issues of the donor and donee had passed the fourth degree of consanguinity (Litt. s. 19). That is to say, for three generations it was a tenure to which no service was incident. The estate in frankmarriage was like other estates tail a conditional fee (see ESTATES), before the passing of the Statute *de Donis*. Gifts in frankmarriage are very old, and were used as a convenient form of giving marriage portions to daughters and kinswomen. And one of several coparceners who was also a tenant in frankmarriage, holding from her father, or other the ancestor from whom the lands descended to her in coparcenary, must bring her frankmarriage land into HOTCHPOT before being allowed to share in the inherited lands with her sisters. Some interesting remarks on the origin of gifts in frankmarriage will be found in Pollock and Maitland's *Hist. Eng. Law*, vol. ii. pp. 15-17.

Frankpledge—A pledge or surety for freemen given to the king for the preservation of the public peace. Every freeman of the age of twelve and upwards must find a surety for himself to the king. Neighbours would accordingly bind themselves together, and be surety for one another for the keeping of the king's peace. Thus originated the system of frankpledge. There were parts of England where frankpledge did not exist at all, as there were also certain classes that were exempt from it. Where frankpledge existed, not only must every freeman above twelve be in "frankpledge," but the township in which he dwelt was responsible for his so being. The groups into which the neighbours formed themselves, consisting generally of ten persons, were called tithings, and were presided over by the elder of the pledge. On an offence being committed by one of the members the responsibility was on the tithing to bring him up to answer for his offence. If an offender escaped, the members of the tithing were fined, and if he were not in any tithing the fine fell on the township. The system of frankpledge was very old and complex in its working. Cowell and the older authorities are of opinion that the custom was borrowed from the Lombards. Sir F. Pollock and Professor Maitland in their *History of English Law* incline to the opinion that it is an old Anglo-Saxon institution (bk. ii. cap. 3, where the system is treated in detail).

The system was greatly developed by periodical inspections (twice a year) held by the sheriff of the county. This inspection was called view of frankpledge, and was held at the Hundred Court. Views of frankpledge were also sometimes taken by a lord of his tenants at the Court leet (see COURT BARON AND COURT LEET), the sheriff's jurisdiction being thus ousted; a system that gave the lord enormous power over his tenants, as well as considerable pecuniary advantage from the fines exacted.

Franktenement—*Liberum tenementum*; *Anglice* freeholding; an estate of freehold. Bracton divides tenements into two kinds—franktenement and villenage; franktenements being held either (1) in knight service, or (2) in free socage. See FREEHOLD; ESTATES.

Fraud.

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Fraud has been defined to be "any kind of artifice by which one deceives another" (Pothier, quoted in Moncreiff on *Fraud*), and as "the intentional determination of the will of another to a decision harmful to his interests, by means of a representation which is neither true nor believed to be true by the person making it" (Holland on *Jurisprudence*, 4th ed., p. 195). Cp. the definitions of the Roman Digest (iv. 3. 1), "*machinatio quædam alterius decipiendi causa, cum aliquid simulatur et aliud agitur*" (Servius), and "*omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita*" (Labeo, both cited by Holland). The term was formerly used, with or without the prefix "legal," and principally by equity judges, to denote various forms of uncandid or unjust conduct (see below, 15. *Constructive Fraud*). This use has been in some instances sanctioned by the Legislature, e.g. in the Sales of Reversions Act, 1867 (see per Lord Selborne in *Aylesford v. Morris*, 1873, L. R. 8 Ch. 484). Since the decision of the leading case of *Derry v. Peek* (*infra*), the term has been generally restricted to cases in which a dishonest deception is an element. It is used in a much wider sense by Mr. Bigelow (*Fraud*). His work is framed upon the definition, "fraud consists in endeavour to alter rights by deception, touching motives, or by circumvention, not touching motives"; the second branch, circumvention, "following in the main the lines of statute law" (i.e. such statutes as that of *FRAUDULENT Conveyances*), is not dealt with in this article, but under the various statutes involved (see also *Com. Dig.*, "Action on the Case for a Deceit." A valuable discussion of the definition of fraud will be found in Bigelow on *Fraud*, ed. 1890, ch. i., also printed in 3 *Law Quarterly Review*).

The legal effect of a fraud may be (A) to give a right to damages in an action for deceit; (B) to annul a transaction—for instance, to make a contract voidable, since "fraud vitiates everything"; or (C) to set up an *ESTOPPEL* (vol. v. p. 74).

A. THE ACTION FOR DECEIT.

Where a representation, false to the knowledge of the defendant, or made by him without an honest belief that it is true, has been made by him in order to induce the plaintiff, or any person of the class to which the representation is addressed, to act in a particular way, and the plaintiff has been deceived thereby, and induced to act accordingly, and, as a consequence, has suffered pecuniary loss, the plaintiff is entitled to recover the loss from the defendant.

*The action was originally a pure common law action, but the Court of Chancery awarded restitution in place of damages on the same principles (see *Adam v. Newbigging*, 1887, 34 Ch. D. 582; 13 App. Cas. 308). It makes no difference, since the Judicature Acts, whether it is brought in the Chancery or in the Queen's Bench Division (*Derry v. Peek*, 1889, 14 App. Cas. 337, reversing 37 Ch. D. 541).

1. *The representation* may be by express words or conduct, positive assertion or suggestion, or active concealment of something desirable to be known (Pollock on *Contracts*, 6th ed., p. 535). For instance, by playing with false dice, personation, or the use of forged documents (Com. Dig., "Action on the Case for a Deceit," A. (1) (2) (3)); by bribing an agent and allowing the principal to believe that the agent is acting in his interest (*Mayor of Salford v. Lever*, [1891] 1 Q. B. 168); by the employment of a puffer at an auction without notice that the vendor reserves the right to bid (vol. i. p. 414); by hiding defects in goods so that a buyer is deceived on examining them (see *Horsfall v. Thomas*, 1862, 1 H. & C. 90; *Schreider v. Heath*, 1813, 3 Camp. 506; 14 R. R. 825); publishing part of a report and concealing another part which qualifies it (*Arkwright v. Newbolt*, 1881, 17 Ch. D. at p. 318). A *suppressio veri* is a false representation only "if withholding that which is not stated makes that which is stated absolutely false" (i.e. *Peek v. Gurney*, 1873, L. R. 6 H. L. 392, at p. 403). Merely allowing the plaintiff to continue under, and to act upon, a mistake to which the defendant has not contributed, is no ground for an action of deceit (*Keates v. Cadogan*, 1851, 10 C. B. 591); nor is the mere concealment of a material fact which the defendant was morally but not legally bound to disclose (*Peek v. Gurney*, *supra*, at p. 390). Thus selling a beast known to be diseased is not a false representation that it is healthy (*Ward v. Hobbs*, 1877, 3 Q. B. D. 150; 4 App. Cas. 13). It is the better opinion that an action will lie for allowing the plaintiff to act upon a statement honestly made by the defendant, but discovered by him to be false, before the mischief is done (*Arkwright v. Newbolt*, 1881, 17 Ch. D. at pp. 325, 329; Pollock on *Torts*, 4th ed., p. 268). It is clear that a contract between the parties induced by the statement would be voidable (*Trail v. Baring*, 1864, 4 De G., J. & S. at p. 329; *Reynell v. Spry*, 1852, 1 De G., M. & G. 660; *Redgrave v. Hurd*, 1881, 20 Ch. D. 1). It must be a representation of existing facts, not an opinion or a promise. This is illustrated by the following examples. A true statement that the defendant does not intend to enforce a debt is not actionable because he changes his mind (*Chadwick v. Manning*, [1896] App. Cas. 231; *Jordan v. Money*, 1854, 5 H. L. 185); but if the statement was untrue, it would have been fraudulent, for present intention is a matter of fact (per Bowen, L.J., in *Edgington v. Fitzmaurice*, 1884, 29 Ch. D. at p. 483); for instance, the intention to pay for goods bought (*Load v. Green*, 1846, 15 Mee. & W. 216; *Clough v. L. and N.-W. Ry. Co.*, 1871, L. R. 7 Ex. 26). It was formerly held that no action lay upon an untrue statement by a buyer that he would give no more than a certain sum. It is "that which every seller in this town does every day, who tells every falsehood he can to induce a purchaser to purchase" (per Mansfield, C.J., in *Veston v. Keys*, 1810, 12 East, 632; 4 Taun. at p. 493; 11 R. R. 499, see p. 505 n.); but the exception is inconsistent with modern decisions. If deliberately untrue "puffing" by a vendor is not actionable, as it is said not to be (Sugden, *Vendors and Purchasers*, 14th ed., p. 2; Clerk and Lindsell on *Torts*, 2nd ed., p. 452), this must be because the purchaser is not taken to have relied and acted upon it (see below, 6.).

The representation may be of matters of law, at anyrate in the concrete

form of statements as to private rights (see per Lord Westbury in *Cooper v. Phibbs*, 1867, L. R. 2 H. L. 149, and per Mellish, L.J., in *Rogers v. Ingham*, 1876, 3 Ch. D. 350). It may be as to the effect of a deed (*West London Commercial Bank v. Kitson*, 1884, 13 Q. B. D. 360; *Hirschfeld v. L. B. and S. C. Rwy. Co.*, 1876, 2 Q. B. D. 1). A representation of general law would be generally taken to be a mere expression of opinion (*Rashdall v. Ford*, 1866, 2 L. R. Eq. 750; Pollock on *Torts*, 5th ed., p. 273).

No action could have been brought in a common law Court upon a representation concerning the character, conduct, ability, trade, or dealings of a third person whereby he obtained credit, money or goods, unless it were in writing and signed by the defendant (Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 6; see **GUARANTEE**). Sir Frederick Pollock (*Torts*, p. 290) suggests that as this rule did not apply in equity, it may now be obsolete. It is submitted it still applies to an action for damages, since a Court of equity would not have entertained such an action (see *In re Northumberland Avenue Hotel Co.*, 1886, 32 Ch. D. 163). In *Clydesdale Bank v. Paton* ([1896] App. Cas. 381) it was assumed that the corresponding Scotch Act (19 & 20 Vict. c. 60, s. 6) is still operative. The Act applies to a fraudulent representation made by a creditor to induce a third person to accept bills, and with the "further and fraudulent purpose of enabling the creditor to appropriate these bills to payment of his debt" (per Lord Watson, *l.c.* at p. 391).

As to the Directors Liability Act, 1890, see vol. iii. p. 186.

2. *It must be False to the Knowledge of the Maker.*—It is now finally determined that no action for deceit lies upon a representation which the maker believed to be true, however unreasonable the grounds of his belief (*Derry v. Peek*, 1889, 14 App. Cas. 337; see two articles in the *Law Quarterly Review* on this case by Sir William Anson and Sir Frederick Pollock, vi. p. 72, v. p. 410), even though he made it carelessly, without appreciating the importance and significance of the words used (*Angus v. Clifford*, [1891] 2 Ch. 449), for negligent misrepresentation does not amount to deceit, and can only give a cause of action where there is a duty to be careful, *i.e.* not to give information except after careful inquiry (per Bowen, L.J., in *Low v. Bouverie*, [1891] 3 Ch. 82, at p. 105; *Le Lievre v. Gould*, [1893] 1 Q. B. 491). The contrary doctrine of *Smith v. Chadwick*, 1881, 20 Ch. D. 27, and of Lord Chelmsford's judgment in *Western Bank of Scotland v. Addie* (1867, L. R. 1 H. L. Sc. at p. 162) is overruled. But if the defendant alleges that he honestly believed the statement, the unreasonableness of his grounds of belief may be cogent evidence of the contrary (*Derry v. Peek*, *supra*). And, as everyone who makes a statement in order to induce another to act on it must be taken, at least, to represent that he does believe it, the action lies if he had no belief, but acted recklessly, careless whether the statement was true or false (*ibid.*; *Evans v. Edmonds*, 1853, 13 C. B. 1, at p. 786, per Maule, J.), provided he was conscious that he did not believe the statement (*Derry v. Peek*, at p. 371). It follows that the defendant is not liable because he had forgotten the truth (*Low v. Bouverie*, *supra*; *Brownlie v. Campbell*, 1880, 5 App. Cas. at p. 936).

If a statement is ambiguous, the defendant must be shown to have meant it to be believed in the untrue sense (*Glasier v. Rolls*, 1889, 42 Ch. D. 436).

Proof of a corrupt motive is not required. Thus in *Polhill v. Walter* (1832, 3 Barn. & Adol. 114) the defendant was held liable for pretending that he had an authority which he honestly expected subsequently to obtain. And it is immaterial whether the defendant expected to benefit by the fraud or not (*Pasley v. Freeman*, 1789, 3 T. R. 51; 1 R. R. 634).

3. *Agent.*—The principal is liable for the fraudulent representation of

his agent, made in the course of the principal's business, or otherwise within the scope of the agent's authority, and for the benefit of the principal (*Barwick v. English Joint-Stock Bank*, 1867, L. R. 2 Ex. 259), but not if it was made for the agent's private ends (*British Mutual Banking Co. v. Charnwood Forest Co.*, 1887, 18 Q. B. D. 714). To complete the cause of action, it is the agent who makes the false statement who must be without an honest belief in its truth (above, 2.). It is not sufficient that the principal knew the truth, if he neither made nor authorised the statement (*Cornfoot v. Fowke*, 1840, 6 Mee. & W. 358; Pollock on *Torts*, pp. 291, 292; cp. *Blackburn v. Vigors*, 1887, 12 App. Cas. 531). A corporation is liable, as any other principal, for the fraud of its agent (*Barwick v. English Joint-Stock Bank*, *supra*).

An agent, e.g. a director, is not liable for the fraud of another agent of the same principal, e.g. a co-director (*Cargill v. Bower*, 1878, 10 Ch. D. 502), or the company's broker (*Weir v. Barnett*, aff. as *Weir v. Bell*, 1877, 3 Ex. D. 32, 238), unless (possibly) he ratifies the fraud by receiving and retaining the proceeds of it (*Weir v. Bell*, *supra*).

The agent is, of course, also liable for the fraud (*Swift v. Interbotham*, 1873, L. R. 8 Q. B. 244).

A partner is liable for the fraud of his copartner to the extent to which the latter is his agent according to the same rule (Partnership Act, 1890, ss. 10, 11, 12; *Cleather v. Twisden*, 1883, 24 Ch. D. 731, 28 *ibid.* 340).

4. *Wife*.—The husband is liable for the frauds, as for the other torts, of his wife, but he cannot be made liable for her contracts by putting the case upon fraud, where substantially it is one of contract (*Liverpool, etc., Association v. Fairhurst*, 1854, 9 Ex. 422; *Wright v. Leonard*, 1861, 11 C. B. N. S. 258). See further, HUSBAND AND WIFE.

5. *Made to induce the plaintiff to act*, in the belief that it is true, in the manner in which he has acted.—If the representation is addressed to the whole public or to any particular class, then any of those to whom it is addressed who acts upon it may sue (*Richardson v. Silvester*, 1873, L. R. 9 Q. B. 34). So a purchaser of shares in the market cannot sue the directors upon a prospectus intended to induce persons to apply for allotment of shares to the company (*Peck v. Gurney*, 1873, L. R. 6 H. L. 377). It would be otherwise if the prospectus had been intended to induce the public to buy in the market so as to raise the price of shares (*Andrews v. Mockford*, [1896] 1 Q. B. 372). Where a gun was represented to be safe, and was sold for the use of the plaintiff to his father, the plaintiff recovered for injuries caused to him by the gun bursting (*Langridge v. Levy*, 1837, 2 Mee. & W. 519, 4 *ibid.* 337).

6. *Actually deceiving the plaintiff*, and having been a material inducement to his action (Sir Frederick Pollock explains *Horsfall v. Thomas*, 1862, 1 H. & C. 90, *Torts*, p. 285, as an ineffective attempt to deceive). It need not have been the sole inducement (see *Peck v. Derry* in the C. A. 37 Ch. D. 541; *Reese River Co. v. Smith*, 1869, L. R. 4 H. L. 64; *Clarke v. Dickson*, 1859, 6 C. B. N. S. 453). If the plaintiff was in fact deceived, it is immaterial that he had, whether from the defendant or independently, the means of ascertaining the truth (*Redgrave v. Hurd*, 1881, 20 Ch. D. 1).

7. *Damages*.—Damage is a part of the cause of action. There is no action for a naked lie (*Rusley v. Freeman*, 1789, 3 T. R. 51; 1 R. R. 634; *Smith v. Chadwick*, 1884, 9 App. Cas. at p. 196). The measure of damages is the amount of the actual loss sustained as the consequence of acting upon the fraudulent representation, provided it is not too remote (*Barry v. Croskey*, 1861, 2 John. & H. 1; *Barber v. Lissiter*, 1860, 7 C. B. N. S. 175; *Collins v.*

Cane, 1860, 4 H. & N. 225). So that where the plaintiff has been induced to purchase worthless shares, it is the sum he gave for them (*Twyer v. Grant*, 1877, 2 C. P. D. 469). If the shares have any real value when the fraud is committed, or if they have been sold by the plaintiff, the value or price received must be deducted from the amount paid for them by the plaintiff (*Waddell v. Blockey*, 1879, 4 Q. B. D. 678; *Tomlin v. Lace*, 1889, 43 Ch. D. 191; *Peck v. Derry*, 1887, 37 Ch. D. 591).

Where the plaintiff was induced to use a dangerous gun, and in consequence received personal injuries, he recovered for these (*Langridge v. Levy*, above, 5.); so where the plaintiff was induced to buy a diseased cow, he recovered for the loss caused by the infection of his other stock (*Mullett v. Nixon*, 1865, L. R. 1 C. P. 559; cp. *Bodger v. Nicholls*, 1873, 28 L. T. 441). As to the costs of actions occasioned by or against the plaintiff, brought or defended by him in reliance on the fraud, see *Richardson v. Dunn*, 1860, 8 C. B. N. S. 655; *Collins v. Cane*, above, 7.

B. RESCISSION.

8. *Fraud vitiates Everything*.—Fraud in all Courts and at all stages of the transaction has been held to vitiate all to which it attaches (per Wilde, B., *Udell v. Atherton*, 1861, 7 H. & N. at p. 181). And evidence may always be given to prove it even though the evidence contradict an agreement in writing; therefore a contract procured by the fraud of one party is voidable at the instance of the defrauded party (below, 9.). A will, or part of the will, procured by fraud may be refused probate (*Allen v. Macpherson*, 1845, 1 H. L. 191). But a marriage is not voidable on the ground of fraud, however gross (see *Moss v. Moss*, [1897] Prob. 263), unless the defrauded party did not understand the nature of the ceremony (see *Ford v. Stier*, [1896] Prob. 1). In general, a party who has been induced to enter into a transaction by fraud must either rescind it or take it as it stands, but an exception exists in the case of marriage settlements. These may be rectified at the instance of the defrauded party, at any rate if the party in fault acted as his agent (Pollock on *Contracts*, 6th ed., 499; see *Clark v. Girdwood*, 1877, 7 Ch. D. 9; and *Lovesy v. Smith*, 1880, 15 Ch. D. 655).

9. *Contract*.—As to the rescission of a contract on the ground of fraud, see vol. iii. p. 345; Pollock on *Contracts*, 6th ed., p. 566.

The rules above stated with regard to the action for deceit apply generally also to determine what is a fraud sufficient to make a contract voidable (Pollock on *Torts*, p. 266), but there are some distinctions. A contract can be rescinded if it was induced by a material misrepresentation, although the misrepresentation may have been honestly made (see vol. iii. p. 344; *Derry v. Peck*, *supra*), and if it has been procured by concealment of a material fact, which it was the duty of the other party to disclose, it will not be enforced (see above, 1.). If the interests of innocent third parties, who are not volunteers, have intervened, the right of rescission is lost. Thus, if a sale of goods (Sale of Goods Act, 1893, s. 24) is obtained by fraud, and they are pledged, the pledgee gets a good title (*Pease v. Gloaghe*, 1866, L. R. 1 P. C. 219; *Badcock v. Lawson*, 1880, 5 Q. B. D. 284). So a shareholder cannot repudiate shares which he has been induced to take by fraud, after an order to wind up the company (*Oakes v. Turquand*, 1867, L. R. 2 H. L. 325; *Tennent v. City of Glasgow Bank*, 1879, 4 App. Cas. 615). There is no analogy between such a case and that of an insolvent partnership. Therefore if the plaintiff has been induced to become a partner by fraud, he is entitled to be, so far as possible, restored to his original position, and to be indemnified against liability.

(e.g. to creditors) from which he cannot be released (*Adam v. Newbigging*, 1887, 34 Ch. D. 582; 13 App. Cas. 308).

The contract to take shares can be repudiated notwithstanding that the shares have been forfeited for non-payment of calls (*Aaron's Reef's v. Twiss*, [1896] App. Cas. 273).

It is not essential that the party defrauded should have given notice of rescission immediately he knew of the fraud (*l.c.*, *q.v.*).

10. *Fraud on Creditors*.—If one creditor bargains for a secret preference over the others as the price of his assent to a composition, this is a fraud upon them (*Cockshott v. Bennett*, 1788, 2 T. R. 763; 1 R. R. 617).

It makes no difference that the preference is not given at the expense of the debtor's estate (*Ex parte Milner*, 1885, 15 Q. B. D. 605). If a bond has been given for the amount agreed upon, it will be ordered to be delivered up to the debtor (*Jackman v. Mitchell*, 1807, 13 Ves. 581; 9 R. R. 229), or if the money is paid, the debtor can recover it (*In re Lenzberg*, 1877, 7 Ch. D. 650; *Atkinson v. Denby*, 1862, 7 H. & N. 934).

There is no fraud if the other creditors know of the preference when they agree to the composition themselves; and there is none where there is not a common basis of assent, as where the debts are bought up and the creditors dealt with separately (*In re Levita's Claim*, [1894] 3 Ch. 365). The rule applies until the composition has been completely worked out (*Ex parte Barrow*, 1881, 18 Ch. D. 464).

11. *Transaction arising out of a Fraud*.—Where a promoter promoted a company to carry out a fraudulent sale, he was not allowed to recover payment for his services (*In re Hereford, etc., Co.*, 1876, 2 Ch. D. 621); and where, on a sale induced by fraud, the vendor got the goods back from the carrier whom he indemnified, the purchaser was not allowed to recover damages for non-delivery from the carrier (*Clough v. L. and N.-W. Ry. Co.*, 1871, L. R. 7 Ex. 26).

12. *Possession*.—Where possession of goods is obtained by fraud, no property passes and an action of trover will lie (*Fryguson v. Currington*, 1829, 9 Barn. & Cress. 59). In the case of money, the sum paid can be sued for as money received for the plaintiff's use (*Wontner v. Sharp*, 1847, 4 C. B. 404), provided that the vendor or payer disaffirm the transaction before an innocent party has obtained an interest for value (*Lindsay v. Cundy*, 1878, 3 App. Cas. 459; *Bulcock v. Lawson*, 1879, 4 Q. B. D. 394; 5 *ibid.* 284). But if the fraud is such that there is not a consent voidable by fraud, but no consent at all to the transfer of possession, so as to make a case of stolen goods or money, for instance where the wrong person obtains delivery by personation, the property does not pass in any event (*Kingsford v. Merry*, 1856, 1 H. & N. 503; *Lindsay v. Cundy*, *supra*; *Attenborough v. St. Katherine's Dock Co.*, 1878, 3 C. P. D. 450; *Pollock on Contracts*, p. 449; *cp. It. v. Ashwell*, 1885, 16 Q. B. D. 190; see PRINCIPAL AND AGENT; and CONVERSION, ACTION OF).

13. *Laches, Limitation*.—The right to complain of a fraud is not lost by delay, unless it is intentionally abandoned with knowledge of the material facts (*Lindsay Petroleum Co. v. Hurd*, 1874, L. R. 5 P. C. 221; see ACQUIESCENCE, *vol.* p. 90). The Statutes of Limitations in the case of a concealed fraud run only from the date of its discovery (3 & 4 Will. IV. c. 27, s. 26; *Vane v. Vane*, 1872, L. R. 8 Ch. 383; *Gibbs v. Guild*, 1882, 9 Q. B. D. 59).

As between parties who are innocent of the fraud, it is frequently laid down that the party whose conduct has enabled the guilty person to commit the fraud should suffer rather than the other. Thus, where there is a real but voidable contract or passing of property (see above, 9., 12.), the right to rescind the transaction is lost if the interests of an innocent

purchaser intervene. But where there is not, the defrauded party cannot hold another liable merely because the negligence of the latter has facilitated the fraud (see *Scholfield v. Londesborough*, [1896] App. Cas. 514).

14. *Pleading, Practice, Costs*.—Where fraud is relied on, it must be distinctly pleaded (Order 19, rr. 6, 22; *In re Rica Gold Washing Co.*, 1879, 11 Ch. D. 36; see also the note to r. 22 in the *Annual Practice*). Frivolous charges of fraud will be struck out (*Laurance v. Norreys*, 1889, 15 App. Cas. 210). The costs of unfounded charges of fraud ought to be thrown upon the party making them in any event, (*Thomson v. Eastwood*, 1877, 2 App. Cas. at p. 243; *Parker v. Mackenner*, 1874, L. R. 10 Ch. 96; and see next case).

A new case of fraud is not allowed to be raised upon appeal (*Connecticut, etc., Co. v. Kavanagh*, [1892] App. Cas. 473). And if an action is substantially based upon fraud, the Court is unwilling to allow the plaintiff to shift his ground to negligence if he fails to prove fraud (*London Chartered Bank of Australia v. Lemprière*, 1873, L. R. 4 P. C. 572; *Hickson v. Lombard*, 1866, L. R. 1 H. L. 324).

15. *Constructive Fraud*.—This term has been variously and loosely used; on the one hand, as a convenient *nomen collectivum* for a variety of contracts and other transactions obnoxious to public policy; or on the other, as only a synonym for actual fraud (Bigelow on *Fraud*, p. 9). BROCAGE (MARRIAGE) contracts, contracts in RESTRAINT OF TRADE, CATCHING BARGAINS, FRAUDULENT CONVEYANCES, cases of UNDUE INFLUENCE, frauds on third parties (above, 10., 11.), and contracts contrary to public policy, are instances of the subjects to which the term is sometimes applied. See also Lord Hardwicke's classification of frauds (he does not use the adjective "constructive") in *Chesterfield v. Janssen*, 2 Ves. Sen. 155; 1 White and Tudor's *L. C.*

16. *Fraud on the Court*.—A judgment obtained by fraud may be set aside in a fresh action commenced for the purpose (*Flower v. Lloyd*, 1877, 6 Ch. D. 297). It constitutes no estoppel (see ESTOPPEL). The fraud must be such as to involve moral guilt, it "must be fraud which you can explain and define on the face of a decree," so that "mere irregularity, or the insisting upon rights which upon due investigation of those rights might be found to be overstated or overestimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled" (per Cairns, L.J., in *Patch v. Ward*, 1867, L. R. 3 Ch. 203). In *Flower v. Lloyd* (1879, 10 Ch. D. 327) James, L.J., expressed an opinion that fraud which consists in the concealment of facts at the trial, or in giving or suborning false evidence, cannot be relied on as a ground for setting aside the judgment obtained in a contested action; but this opinion has not been followed (*Abouloff v. Oppenheimer*, 1882, 10 Q. B. D. 295). And so long ago as 1757 the Court set aside a judgment obtained by trick, the plaintiff having secured a verdict by refusing to produce a document which would have defeated his action, but which he had had no "notice to produce" (*Anderson v. George*, 1 Burr. 353). Where a solicitor put in a fraudulent defence on his client's behalf, but without the client's knowledge, and the opposite party, who was innocent of the fraud, obtained judgment upon the admissions contained in the defence, the Court of Appeal set aside the judgment, and allowed the defence to be withdrawn and a new one put in (*Williams v. Preston*, 1882, 20 Ch. D. 672).

If a solicitor by negligence allows money to be fraudulently obtained out of Court by his client, or by anyone whom he has allowed to use his name, he is liable to make good the loss (see *Marsh v. Joseph*, [1897] 1 Ch. 213; *Slater v. Slater*, 1888, *ibid.* p. 222 n).

Fraud on the Court takes the form of collusion where both plaintiff and defendant are parties to it. The facts put before the Court may be either (a) non-existent, or (b) existent but corruptly preconcerted by the parties (see the *Duchess of Kingston's* case, 1 Smith, *L. C.*).

[*Authorities.*—The principal treatises are those of Bigelow (American), 1890, Moncreiff (1891), Kerr (1883). See also the notes to *Chandelor v. Lopus* and *Pasley v. Freeman* in Smith's *L. C.*]

Fraud on Marital Rights.—See SETTLEMENTS; and *Strathmore v. Bowes*, 1789, 1 Ves. Jun. 22; 1 R. R. 76; *White and Tudor's L. C.*

Fraud on Powers.—See POWERS.

Frauds, Statute of.—The Statute of Frauds (29 Car. II. c. 3) was a valuable piece of legislation in its day, especially at a time when the evidence of parties to a suit was not admissible. It consists of a number of requirements for documentary or other evidence of various legal transactions, made with a view to the prevention of fraud and perjury. Lord Nottingham claimed to be the author of the statute, and to have introduced it into the House of Lords, though he says that it received additions and improvements from some judges and civilians (*Ash v. Abdy*, 3 Swans. 664). The Act consisted of twenty-four clauses, of which one, the thirteenth, was in subsequent editions of the Act divided in two, so that the later sections were wrongly numbered.

Secs. 1, 2, 3 relate to the creation or assignment of interests in land. Before the passing of the statute, writing or deed was not essential to the creation of a freehold estate in possession, or of an estate for years. Appropriate words followed by livery of seisin in the case of freehold, or by entry in the case of estates for years, would effect the purpose of the parties, although a deed was usually executed or writing signed as evidence of the transaction.

Sec. 1 enacts that any interest of freehold, term of years, or uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, not put in writing and signed by the parties making or creating the same, or their agents *lawfully authorised in writing*, shall have no more effect than an estate at will.

Sec. 3 makes the same requirement as to assignment, grant, or surrender of such interests.

It should be noted that in most of these cases the transaction is avoided by 8 & 9 Vict. c. 106, s. 1, unless it be by deed. Whether such a deed needs signature, as required by the Statute of Frauds, or whether the requirement of a document under seal supersedes the requirement of signature, remains an open question (*Williams, Real Property*, 17th ed., p. 149).

Sec. 2 makes an exception in favour of leases not exceeding the term of three years where the rent reserved amounts to three-fourths of the full improved value of the land. These may be by parol, but an agreement for such a lease would fall under the fourth section, which we must now consider.

Sec. 4 provides that no action shall be brought in the case of certain contracts unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing signed by the party

to be charged therewith, or some person thereunto by him lawfully authorised.

The contracts specified are five:—

(1) A special promise by an executor or administrator to answer damages out of his own estate;

(2) A special promise to answer for the debt, default, or miscarriage of another. The words "special promise" seem to point to a resemblance in these two contracts. In each case there is a primary liability, of the estate in the one case, in the other case of the party, whose "debt, default, or miscarriage" is answered for. But the promise in (1) may be absolute or conditional—a promise to pay if the estate does not suffice, or a promise to pay in relief of the estate; the promise in (2) must be conditional, that is, it must not be an indemnity (*Reader v. Kingham*, 1863, 13 C. B. N. S. 344; *Sutton & Co. v. Grey*, [1894] 1 Q. B. 288; *In re Hoyle*, [1893] 1 Ch. 98), nor a promise to pay for things done or promised for the benefit of a third party (*Birkmyr v. Darnell*, 1 Sm. L. C. 310). There must be three parties—the creditor, the person primarily liable, and the guarantor (see GUARANTEE; INDEMNITY; PRINCIPAL AND SURETY).

(3) Any agreement made in consideration of marriage (for this see Leake on *Contracts*, 3rd ed., p. 211).

(4) Any contract or sale of lands or hereditaments, or any interest in or concerning them. As to this contract it should be noted—(a) that a parol lease not exceeding the term of three years is valid as a lease under sec. 2, but that an agreement for such a lease must be in writing under sec. 4, and that the parol lease, though good as a lease, cannot be treated as an agreement upon which action can be brought against the lessee for not taking possession, unless there be writing as required by sec. 4; (b) there is sometimes a difficulty in determining whether a contract is, or is not, concerned with an interest in land. Growing crops produced by cultivation (see GROWING CROPS) are distinguished from natural produce of the soil, such as growing grass or fruit. An agreement for the sale of the former is in no case an agreement concerning an interest in land, and in the case of the latter only if the property is to pass before severance (see SALE OF GOODS). Again, a contract for an easement does, while a contract for a licence does not—a contract for purchase of fixtures does, a contract as to removal of fixtures does not—concern an interest in land (Leake on *Contracts*, 3rd ed., pp. 215–218).

(5) Agreement not to be performed within a year from the making thereof. The upshot of the decided cases turning on this contract is that the parties must clearly contemplate liabilities on both sides extending beyond the year (*Donellan v. Read*, 1832, 3 Barn. & Adol. 899).

Where this is so, conditions subsequent which might bring the contract to an end within the year do not take it out of the statute.

The requirements of the section are tolerably well ascertained.

"No Action shall be brought."—The contract therefore is not void or voidable, but merely unenforceable, until the necessary evidence is forthcoming (*Leroux v. Brown*, 1853, 12 C. B. 801), and this evidence may be provided either before the conclusion of the contract, as in the case of a written offer signed by the offeror and accepted by parol (*Reuss v. Picksley*, 1866, L. R. 1 Ex. 342), or after the contract is made, even though the letter which contains the terms of the contract contains also a repudiation of them (*Buxton v. Rust*, 1872, L. R. 7 Ex. 1 and 279).

"Unless the Agreement or some Memorandum or Note thereof shall be in writing."—What is a sufficient memorandum or note? It is settled that

(a) the name of each party must appear in the document, not merely in the signature at the end (*Williams v. Jordan*, 1877, 6 Ch. D. 517); for this purpose letter and envelope are considered as one document (*Pearce v. Gardner*, [1897] 1 Q. B. (C. A.) 688).

(b) That the terms must appear and that the word "agreement" must be construed to require that the consideration as well as the promise should be set forth in the memorandum (*Wain v. Warlters*, 1804, 5 East, 10; 7 R. R. 645).

An exception to this rule is made in the case of the promise to answer for the debt, default, or miscarriage of another, by 19 & 20 Vict. c. 97, s. 3 (Mercantile Law Amendment Act).

(c) Where the writing is to be found in several documents parol evidence may be admitted to identify and to connect the documents. Such evidence appears to be only admissible where upon the identification of the documents this connection is obvious; but the matter is not free from doubt (*Long v. Millar*, 1879, 4 C. P. D. 450; *Oliver v. Hunting*, 1890, 44 Ch. D. 205; Fry, *Specific Performance*, 254).

(d) Parol evidence is also admissible to identify the contracting parties if not named but indicated by description or reference. Thus an agent contracting in his own name may prove the existence of his principal (*Filby v. Hounsell*, [1896] 2 Ch. 737). Parol evidence may also be given to identify "the owner" of a property named or "the executor" of a person named. In like manner a property described so as to make identification simple may be identified by parol evidence (*Plant v. Bourne*, [1897] 2 Ch. (C. A.) 281; Leake, 3rd ed., p. 230, and cases there cited).

"Signed by the Party to be charged therewith."—The signature must be the signature of the party to be charged. The contract need not be signed by both, nor need the signature be at the end of the memorandum; it may be at the beginning or in the middle, it may be a mark, it may be printed or stamped, but it must be intended to authenticate the entire contract (Fry, *Specific Performance*, 247; Leake, 3rd ed., 236).

"Or by some other Person thereunto by him lawfully authorised."—Secs. 1 and 3 require the agent therein mentioned to receive a written authority. Sec. 4 makes no such requirement. Any mode in which the relation of principal and agent may be created—by prior authority, by inference, or by ratification—is sufficient (Fry, *Specific Performance*, 3rd ed., 248).

Under certain circumstances the Court of Chancery will recognise part performance of a contract falling within the statute, as supplying the want of writing, and as enabling the Court to uphold the contract. Since the Judicature Act this rule is of general application. It has been said to be confined to contracts for an interest in land (*Britain v. Rossiter*, 1883, 11 Q. B. D. 123; and Leake, 257), or to cases in which a Court of equity would entertain a suit for specific performance if the alleged contract had been in writing (*M'Manus v. Cooke*, 1887, 35 Ch. D. 681). Sir E. Fry would somewhat extend this application of the rule (*Specific Performance*, 276).

The next two sections deal with devise of land. Secs. 5 and 6 were most useful provisions in 1677, for they prescribed for the first time a form for wills, and for the revocation of wills, of land. Some hardship was occasioned by the judicial interpretation put upon the term "credible witness" in sec. 5, but this was rectified by 25 Geo. II. c. 6. The sections were repealed by the Wills Act, 7 Will. IV. and 1 Vict. c. 25. (See WILL.)

The next four sections deal with trusts.

Sec. 7 avoids all declarations or creations of trust in lands or hereditaments, except such as are made in writing, signed by the party able to declare such trust or by his last will in writing. For the interpretation of this section, see *Rochevoucauld v. Boustead*, [1897] 1 Ch. (C. A.) 197, and cases there cited.

Sec. 8 saves from the operation of this clause such trusts as arise by implication of law.

Sec. 9 avoids grants or assignments of trusts, unless they are in writing signed by the party granting or assigning the same, or devised by him as aforesaid.

Sec. 10 provides that where a trust estate descends, the heir shall be liable for the debts of his ancestor, as though the estate had descended at common law; but by sec. 11 the heir shall not be liable for these debts beyond the amount of the trust estate out of which they are due.

Secs. 12, 13, and 14 are repealed. Sec. 12, which made estates *pur autre vie* devisable, was repealed by the Wills Act, 1837. Secs. 13 and 14, which imposed conditions on the effect which judgments might have on lands held by *bond fide* purchasers for value, were repealed by 42 & 43 Vict. c. 59.

Secs. 15, 16 are repealed and re-enacted in substance by the Sale of Goods Act, 1894, ss. 26, 4. (See SALE OF GOODS.)

Sec. 17, repealed by 44 & 45 Vict. c. 3, deals with recognisances in the nature of a statute staple, by which lands were made security for debt. These are not henceforth to bind lands in the hands of a *bond fide* purchaser for value, except from the date of their enrolment, which was to be entered in the record of the recognisance. (See RECOGNISANCE; STAPLE.)

Secs. 18–21 repealed by the Wills Act, 1837. These sections deal with nuncupative wills of personal property, avoiding such as deal with estates more than £30 in value, unless various regulations are observed, and forbidding revocation of a written will of personal property unless the revocation be also in writing attested by three witnesses.

Sec. 22 makes an exception, still in force, to the foregoing clauses in favour of soldiers on military service, and sailors when at sea. For these clauses see WILL; PROBATE.

Sec. 23 provides that nothing in the Act shall affect the jurisdiction of Probate Courts, but that this jurisdiction shall be exercised subject to the regulations of the Act. This might well be repealed.

Sec. 24 is explanatory of the Statute of Distributions as regards the right of the husband to administration of the estate of a *feme covert* dying intestate. See HUSBAND AND WIFE; DISTRIBUTIONS, STATUTE OF.

Fraudulent—

Appointment.—See POWERS, *Execution of*.

Assignment.—See FRAUDULENT *Conveyances*, *infra*.

Assurance.—See *ibid.* and BANKRUPTCY, vol. i. at p. 486.

Bankrupt.—See FRAUDULENT *Debtor*.

Conveyances.—Fraud is protean in its forms, but one form has been common to all ages and nations—the fraud of a debtor seeking to put his property out of the reach of his creditors. English law, which “abhors

covin," has from the earliest time endeavoured to defeat designs of this kind. Thus 50 Edw. III. c. 6, and 3 Hen. VII. c. 4, were both directed against collusive gifts by a debtor in secret trust for himself. These statutes were, however, superseded by the more comprehensive Statute 13 Eliz. c. 5, which, after reciting "that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion, or guile to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, forfeitures, etc., declares and enacts that every feoffment, etc., of lands, tenements, hereditaments, goods, or chattels by writing or otherwise, and every bond, suit, judgment, or execution made for any intent or purpose before declared and expressed, shall be, as against that person, his heirs, successors, executors, administrators, or assigns, whose actions, etc., are or might be in anywise disturbed, delayed, hindered, or defrauded by such practices, utterly void"; with this qualification that the statute is "not to extend to any estate or interest in lands, etc., on good consideration, and *bonâ fide* lawfully conveyed to any person not having notice of such covin." This celebrated statute has for more than three hundred years formed an effectual bulwark against frauds on creditors. It is, as Lord Mansfield said, only declaratory of the common law, but it has the merit of having formulated the common law with precision. Being in suppression of fraud, it is to be and has always been liberally expounded.

What Property is within the Statute.—All kinds of property, real and personal, legal and equitable, vested, reversionary, or contingent, are within the statute, provided it is property which creditors could have reached by execution at the date of the fraudulent conveyance. Hence, as fresh species of property have been rendered available to execution creditors by the Legislature, the operation of the statute has widened. If the property conveyed is property which is not liable to execution, it is, even now, not within the statute, for creditors are not wronged.

"On good Consideration and bonâ fide."—It is on this qualifying proviso that the validity of conveyances under 13 Eliz. c. 5 has chiefly turned. It is not sufficient, as the words themselves show, that the conveyance should be for good consideration; it must also be *bonâ fide* (*Corlett v. Radcliffe*, 1861, 14 Moo. P. C. 121, 135; *In re Johnson*, 1881, 20 Ch. D. 389). Conversely, it is not enough that the conveyance should be *bonâ fide*; it must be also for good consideration.

Voluntary Conveyances.—The principle underlying the law as to voluntary conveyances is that a man must be just before he is generous. A person who is indebted is not entitled to give away—that is, to convey without any equivalent—what is in truth not his but his creditors' property (*Freeman v. Pope*, 1869, L. R. 5 Ch. 340). "Good" in the statute means valuable consideration, not a consideration merely meritorious, such as natural love and affection, which is of no benefit to creditors. The expression "indebted," however, in this proposition must not be taken to mean merely that the grantor or settlor owes some debts (*Townsend v. Westcott*, 1839, 2 Beav. 340, 344); if it did, no conveyance would be safe; nor, on the other hand, does it mean that the debtor must be proved to have been insolvent. The true criterion when a voluntary conveyance is made by a person indebted is this: Does the conveyance subtract from that property which is the proper fund for the payment of the grantor's debts an amount without which those debts cannot be paid? If it does—if the necessary consequence of the conveyance or settlement is that some creditors must remain unpaid, the inference to be drawn is that the conveyance is fraudulent (*Kent v. Riley*, 1872, L. R.

14 Eq. 190; *Smith v. Cherrill*, 1867, L. R. 4 Eq. 390, 395), and the Court does not, to find the conveyance fraudulent, require proof that the grantor had an intention to defeat, delay, or defraud. It is sufficient that the conveyance was calculated to have that effect; but if the grantor has, at the date of the conveyance, property left in tangible assets outside the conveyance or settlement amply sufficient to meet all his existing debts and liabilities, the voluntary conveyance will not be obnoxious to the statute even though the grantor may be temporarily embarrassed (*Ex parte Russell*, 1881, 19 Ch. D. 588; *In re Ridler*, 1883, 22 Ch. D. 74; *Crossley v. Elworthy*, 1866, L. R. 2 Eq. 167; *Holmes v. Penney*, 1857, 3 Kay & J. 90, 99).

Future Creditors.—If a man is not indebted at the time that he makes a conveyance, and means no fraud on future creditors, the conveyance, though voluntary, will be good against future creditors. This is well established (*Mackay v. Douglas*, 1880, L. R. 14 Eq. 121). But the transaction must be free from fraud, for a man, though not indebted at the time of conveying, may contemplate doing something which may lead to indebtedness or insolvency (*Jenkyn v. Vaughan*, 1857, 3 Drew. 419), embarking, for example, in a hazardous business (*Crossley v. Elworthy*, 1871, L. R. 12 Eq. 158). In such a case his conveying or settling all his property (*Warc v. Gardner*, 1868, L. R. 7 Eq. 317), or substantially the whole (*Ex parte Russell*, 1881, 19 Ch. D. 588; *Mackay v. Douglas*, *supra*), by way of post-nuptial settlement on his wife and children to avoid the risks of the adventure, and thus denuding himself of his property when he is just about to contract debts, is a strong badge of fraud, and the inference is almost irresistible that he means to defeat creditors. The onus, however, of proving fraud where the grantor or settlor was not indebted at the time is thrown on those who impeach the conveyance; for fraud is not to be presumed (*Jenkyn v. Vaughan*, *supra*). There is no fraud on future creditors in a solvent spendthrift tying up his property under a FAMILY ARRANGEMENT entered into for value, for the object of such a settlement is to check the settlor's extravagance, not to defeat creditors (*In re Tetley*, 1896, 3 Manson, 226, 321).

The Statute of 13 Eliz. c. 5 has nothing to do with bankruptcy as such, except this that a conveyance which is fraudulent under the statute will constitute an act of bankruptcy under sec. 4 (1) (a) of the Bankruptcy Act, 1883, of which any qualified creditor of the grantor or settlor may avail himself. The policy of the Legislature has in consequence found it necessary in the Bankruptcy Act, 1883, to go further in the matter of voluntary settlements, and to avoid them in certain circumstances, as against the general body of creditors represented by the trustee in bankruptcy, when they would not be void under the Statute of Elizabeth, and would yet be productive of great hardship to creditors. Under the Act (s. 47) any settlement not being a settlement made before or in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith, and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, is, if the settlor becomes bankrupt within two years after the date of the settlement, to be void against the trustee in bankruptcy; and if, the settlor becomes bankrupt within ten years after the date of the settlement, it is to be avoided, unless the parties claiming under it can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement. This criterion of indebtedness is the same as that under the Statute of 13 Eliz. c. 5. "Settlement" in the Act includes any conveyance or transfer of property. And see BANKRUPTCY.

Conveyances for Value when within the Statute.—To impeach a conveyance for value as fraudulent under the statute is a matter of much greater difficulty than when the conveyance is voluntary, and the reason is the respect always paid by our law, and properly paid, in the interests of honest trading, to the rights of a purchaser for value. To successfully challenge such a conveyance, it is not enough to show fraud by the vendor. The purchaser must be shown to have been privy to the fraud on creditors, and for this purpose notice of indebtedness on the part of the vendor is not enough (*An re Johnson*, 1881, 20 Ch. D. 389). In the case of a volunteer it matters not whether he had or had not notice of the fraud. His title is equally bad if the conveyance is within the statute; but to displace the title of a purchaser for value, an actual and express intent on his part to defeat or delay or defraud creditors must be proved. It is not enough that the effect of the conveyance is to defeat and delay creditors, or that creditors are left out or not provided for (*Middleton v. Pollock*, 1875, 2 Ch. D. 102). When once, however, such express intent to defeat the rights of creditors is proved, the fraud supersedes any consideration.

Marriage is a valuable consideration—the highest indeed, as Lord Hardwicke said, of all considerations; but a settlement executed on marriage may still be fraudulent and void under 13 Eliz. c. 5, if the intention of the parties is to defraud and delay creditors, and the marriage is merely part of a scheme for that purpose, as where a solicitor-scrivener married a woman with whom he had cohabited for seven years, settling the whole of his property on her, and two months after became bankrupt (*Columbine v. Pentall*, 1852, 1 Sm. & G. 228; and see *Bulmer v. Hunter*, 1869, L. R. 8 Eq. 46; *Kevan v. Crawford*, 1877, 6 Ch. D. 29; *Wenman v. Lyon*, 1891, 64 L. T. 88; and *Ex parte Bolland*, 1873, L. R. 17 Eq. 115).

Whether a conveyance is or is not *bona fide*—fraud or no fraud—is a question proper for a jury, looking at all the circumstances at the time of the conveyance (*Martindale v. Booth*, 1833, 3 Barn. & Adol. 498). Certain special circumstances have sometimes been described as badges of fraud. One is the generality of the gift. Another is the grantor's remaining in possession though the conveyance is absolute (*Tyrone's case*, *supra*; *Edwards v. Harben*, 1788, 2 T. R. 587; 1 R. R. 548); such continuance in possession suggests collusion and enables the grantor to get undue credit, but neither circumstance is conclusive. Much may depend on the nature of the property—as whether it is land or chattels—and the object of the conveyance.

Setting aside Fraudulent Settlement.—In setting aside a voluntary settlement under 13 Eliz. c. 5, the law respects the rights of all purchasers for value, including mortgagees, whether legal or equitable, of any interest created by the settlement, provided they took before the settlement had been avoided, and without notice that it was fraudulent (*Halifax Bank v. Gledhill*, [1891] 1 Ch. 31); and this principle is fully recognised in bankruptcy (*In re Carter & Kenderdine's Contract*, [1897] 1 Ch. (C. A.) 776).

When a fraudulent conveyance is set aside at the suit of the pre-existing creditors, the property comprised in it becomes available for the benefit of creditors subsequent to the conveyance as well as those existing at its date, and all participate *pari passu*.

A conveyance or settlement which is void under the Statute of Elizabeth is not void *in toto*. It is only void to the extent necessary to give effect to the rights of creditors. For every other purpose it is good (*Curtis v. Price*, 1805, 12 Ves. 89, 103, 106). It is good against the grantor or settlor (*Robinson v. M'Donnel*, 1818, 2 Barn. & Ald. 134), against any other person, privy and consenting to it (*Steel v. Brown*, 1808, 1 Taun. 381), and against strangers,

other than *bona fide* purchasers, for valuable consideration (*Blessey v. Windham*, 1844, 6 Q. B. 116).

Conveyances, Fraudulent, against Purchasers.—The Statute of 27 Eliz. c. 4 is directed against frauds on purchasers, as 13 Eliz. c. 5 is against frauds on creditors. This statute—27 Eliz. c. 4—makes void all conveyances, estates, gifts, grants, charges, and limitations of uses of, in, or out of any lands, tenements, or other hereditaments made for the intent to defraud and deceive such persons as shall purchase the same lands, etc. It is thus confined to land, but it covers all interests therein, whether legal or equitable, corporeal or incorporeal, copyholds, leaseholds, advowsons, rent-charges, annuities issuing out of land, timber and minerals. Like 13 Eliz. c. 5, it nowhere speaks in terms of voluntary conveyances, but such voluntary conveyances have from the first been treated as falling within the policy of the statute, which is the protection of purchasers for value; and the exception in sec. 4 (*Doe v. Manning*, 1809, 9 East, 59; *Trowell v. Shenton*, 1878, 8 Ch. D. 325), in favour of all conveyances had or made “upon or for good consideration and *bona fide*,” evidently points to conveyances which are not for value. The quantum of the consideration is immaterial (*Price v. Jenkins*, 1877, 5 Ch. D. 619), but a merely meritorious consideration—providing for wife and children—will not support a conveyance (*Shurmur v. Sedgwick*, 1883, 24 Ch. D. 597), nor will the fact that it has been executed by the direction of the Court (*Martin v. Martin*, 1831, 2 Russ. & My. 507). The interposition of trustees can make no difference, if the beneficiaries are volunteers (*Townend v. Toker*, 1865, L. R. 1 Ch. 446, 458); and so effectual is the protection of the statute that the purchaser knowing or having notice before purchasing of the prior voluntary settlement does not disentitle him to have the settlement avoided (*Bogspooole v. Collins*, 1870, L. R. 6 Ch. 232; *Buckle v. Mitchell*, 1812, 18 Ves. 110; 11 R. R. 155).

A deed, apparently voluntary, may, however, be supported by proof of a consideration arising subsequently to the deed (*Clarke v. Willott*, 1871, L. R. 7 Ex. 317).

A voluntary settlement, though void against a purchaser, is good against the settlor; and as a corollary from this it might have been expected that where a voluntary settlement is defeated by a sale of the property for valuable consideration the persons entitled would have an equity to be paid the proceeds of sale. But this is not the case (*Rosher v. Williams*, 1875, L. R. 20 Eq. 218). The voluntary settlement is, as to the land sold, gone—become mere waste paper, but only to the extent of the interest of the mortgagee or purchaser (*Croker v. Martin*, 1827, 1 Bli. N. S. 573; *Dolphin v. Aylward*, 1869, L. R. 4 H. L. 499). If the settlement comprises other property besides that sold it remains operative.

Who is a Purchaser.—A mortgagee is a purchaser *pro tanto* within the statute, and this whether the mortgage is legal or equitable. A person with a contract to purchase land is a purchaser (*Buckle v. Mitchell*, 1812, 18 Ves. 100; 11 R. R. 155). An assignee of a lease to which liability attaches is a purchaser (*Price v. Jenkins*, 1877, 5 Ch. D. 619); but a judgment creditor is not a purchaser.

Preferring Creditor.—At common law a debtor in insolvent circumstances may prefer one creditor to another, and there is nothing in 13 Eliz. c. 5 to prevent his doing so (*Holbird v. Anderson*, 1793, 5 T. R. 235). The reason given by Lord Kenyon in that case was that such a preference is given not with a view to any benefit to the debtor, but merely to secure the payment of a just debt to the former; in which there was no illegality or injustice. In

bankruptcy the case is now met by the section against fraudulent preference (s. 48). See BANKRUPTCY.

[*Authorities*.—May, *Fraudulent Conveyances*, 2nd ed.; Smith, *Leading Cases*, 10th ed., vol. i. pp. 1 *et seq.*]

Creditor.—A creditor who wilfully, and with intent to defraud, makes in a bankruptcy or liquidation by arrangement a false claim, or a proof, declaration, or statement of account which is untrue in any material particular, is guilty of misdemeanour, and liable to imprisonment for not over one year with or without hard labour. As to procedure, see FRAUDULENT Debtor.

Debtor.—1. Courts of bankruptcy are under the bankruptcy laws authorised to impose disabilities on bankrupts who have incurred debt by fraud, or have committed frauds on their creditors (see *In re Richardson*, 1886, 4 Mor. Bky. 22; *In re Hedley*, [1895] 1 Q. B. 423). See BANKRUPTCY, vol. i. p. 500.

2. On the abolition of imprisonment for debt, the Debtors Act, 1869 (32 & 33 Vict. c. 62), as extended and amended by the Bankruptcy Acts of 1883 (46 & 47 Vict. c. 52) and 1890 (53 & 54 Vict. c. 71), created a series of indictable offences by debtors. They fall into two classes—those which may be committed by any debtor, and those which can only be punished in the event of the debtor's bankruptcy. All are triable at Quarter Sessions (1869, s. 20), and their definition by the Acts does not exclude liability for the same acts under other statutes or the common law, provided that a man may not be twice punished for the same offence (1869, s. 23; Int. Act, 1889, s. 33). Perjury, for instance, may be committed with respect to many of the matters below mentioned. See Russell on *Crimes*, 6th ed., vol. i. pp. 47, 298, 384, 398.

The amendments in the Act of 1869 effected by the Acts of 1883 and 1890 were made in consequence of decisions limiting the effect of the earlier Act (e.g. *In re Burden*, 1888, 21 Q. B. D. 24; *R. v. Beck*, 1889, 61 L. T. 596), and are not retrospective (*R. v. Griffiths*, [1891] 1 Q. B. 145).

A. The following acts are indictable misdemeanours punishable by imprisonment with or without hard labour for not over twelve months, whether the debtor is a bankrupt or not (*R. v. Rowlands*, 1882, 8 Q. B. D. 530):—

1. If a person in incurring a debt or liability has obtained "credit" under false pretences or by means of any other fraud of a like nature (1869, s. 13 (1); *Ex parte Brett*, 1876, 1 Ch. D. 151).

A man may be convicted of obtaining credit by fraud under the section who obtains a meal at a restaurant without meaning to pay for it (*R. v. Jones*, 1897, 14 T. L. R. 79).

A debt or liability is incurred where a new bill is given for an old one (*R. v. Pierce*, 1887, 56 L. J. M. C. 85), or a loan is obtained (*In re Salomon*, 1893, 28 L. Jo. 874).

2. If a person, with intent to defraud his creditors or any of them, has made or caused to be made any gift, delivery, or transfer of or any charge on his property (1869, s. 13 (2)) (*In re Cranston*, 1892, 9 Mor. 160); or

3. If he has, with like intent, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for the payment of money made against him (1869, s. 13 (3)). It is not settled whether to constitute an offence under 2. the debtor must have more than one creditor (*R. v. Rowlands*, 1881, 8 Q. B. D.

530). The term "judgment or order" seems not to apply to judgments or orders in criminal proceedings or in bastardy, and the term "creditor" in 2. does not apply to a plaintiff in an action for unliquidated damages (*R. v. Hopkins*, [1896], 1 Q. B. 652).

B. It is a felony, punishable by imprisonment for not over two years with or without hard labour, for any person to quit, or attempt or prepare to quit England with property to the amount of £20 or upwards divisible among his creditors, if it be done after or within four months before (1) a bankruptcy petition has been presented by or against him, or a receiving order made; or (2) his affairs are in liquidation by arrangement (1869, s. 12; 1883, s. 163). It is not necessary to charge intent to defraud, but the jury may acquit if satisfied that he had no such intent. The definition of the offence enables arrest to be effected with or without warrant, without resorting to writ of *ne exeat regno*, or the corresponding procedure.

Prosecutions under the section are rare, the latest being *R. v. Jabez Balfour*.

C. The following misdemeanours, all punishable by imprisonment with or without hard labour for not over two years, may be committed by a person adjudged bankrupt or against whom a receiving order has been made, or whose affairs are liquidated by arrangement under the Bankruptcy Act of 1869 (1869, s. 11; 1883, s. 163; 1890, s. 26):—

1. Failure to disclose to the best of his knowledge and belief to the trustee all his property, and when and how, and to whom, and for what consideration he disposed of any part of it, even before bankruptcy (*R. v. Mitchell*, 1880, 50 L. J. M. C. 76), otherwise than in the ordinary course of trade, or for the ordinary expenses of his family (s. 11 (1)).

2. Failure to deliver up to or to the order of the trustee—

(a) All his property in his custody or under his control which he is required under the bankruptcy laws to deliver up (s. 11 (2));

(b) All books, documents, and papers in his custody or under his control relating to his affairs (s. 11 (3)).

3. Material omissions in a statement relating to his affairs (s. 11 (6)). In these cases the jury may acquit, if satisfied that there was no intent to defraud.

D. The next class of offences, to be criminal, must be committed after or within four months before presentation of a bankruptcy petition by or against the accused, or in the case of a receiving order by arrangement, under sec. 103 of the Bankruptcy Act, 1883, after the date of the order (1869, s. 11; 1883, s. 163 (1); 1890, s. 26).

They can therefore not be committed by an infant (*R. v. Wilson*, 1880, 5 Q. B. D. 28), nor by a married woman who is not trading separately from her husband (*In re Lynes*, [1893] 2 Q. B. 113).

4. Fraudulent removal of any part of his property of the value of £10 or over (5), and concealment of property to such amount unless the jury is satisfied there was no intent to defraud (s. 11 (4)); but not removal under an avoidable assignment (*R. v. Creese*, 1874, L. R. 2 C. C. R. 105).

5. Attempt to account for any part of his property by fictitious losses or expenses (s. 11 (12)).

6. Obtaining property on credit by any false representation or other fraud, and not paying for it (s. 11 (13)) (see *Ex parte Stollard*, 1868, L. R. 3 Ch. 408; *R. v. Cherry*, 1871, 12 Cox C. C. 32).

7. False representation or other fraud to get the consent of his creditors, or any of them, to consent to any agreement as to his affairs, bankruptcy, or liquidation (s. 11 (16)).

8. Failure to inform the trustee of proof of a false debt within a month of the time when he knows or has reason to believe it has been made (s. 11 (7)).

9. Fraudulently parting with, altering, or making an omission in any document affecting or relating to his property or affairs, or being privy thereto (s. 11 (11)).

10. Concealment, destruction, falsification of or making any false entry in a book or document relating to his property or affairs if done by him or with his privy, or preventing the production of any such book, document, paper, or writing, unless the jury are satisfied that he did not intend to conceal the state of his affairs or defeat the law (s. 11 (8) (9) (10)).

11. Obtaining property or credit on the false pretence of carrying on business and dealing in the ordinary way of trade, and not paying for it (s. 11 (14)).

12. Pawning, pledging, or disposing of otherwise than in the ordinary course of trade any property obtained on credit and not paid for (s. 11 (15)) (see *Ex parte Brett*, 1876, 1 Ch. D. 151). Notwithstanding the terms of sec. 163 (2), of the Act of 1883, offences 11. and 12. appear to apply only to traders, and the jury can acquit them if satisfied that there was no intent to defraud.

A debtor's criminal liability is not extinguished by his discharge, or acceptance of a composition or scheme of arrangement (Act of 1883, s. 167).

An undischarged bankrupt under the Act of 1883 is guilty of a misdemeanour if he obtains "credit" to the amount of £20 or over, without disclosing that he is an undischarged bankrupt (1883, s. 31). An intent to defraud is not an element in the offence (*R. v. Dyson*, [1894] 2 Q. B. 176). The offence is committed by receiving and keeping goods over the value of £20 without paying for them (*R. v. Juby*, 1886, 16 Cox C. C. 160), even where the creditor is in Ireland and the accused in England (*R. v. Peters*, 1886, 16 Q. B. D. 636, in which case the judges differed as to the exact meaning of "credit").

Persons who aid and abet counsel to procure or incite to the commission of any of these offences are indictable, even if not themselves bankrupts (*Ex parte Evans*, 1881, 29 W. R. 200, 573; *R. v. Chapple*, 1892, 17 Cox, 455); and conspiracy to commit any of the offences in contemplation of bankruptcy is also indictable, even where a bankruptcy has not in the end occurred (*Heymann v. R.*, 1873, L. R. 8 Q. B. 102), and a conspiracy is indictable to make covinous transfers under 13 Eliz. c. 5.

The offences are within the Extradition Acts and Fugitive Offenders Acts. See EXTRADITION; FUGITIVE OFFENDERS.

Prosecution.—A Court having bankruptcy jurisdiction may order a prosecution for any of the above offences. The order is made on the trustee or the official receiver (1869, s. 16; 1883, s. 164) (*Ex parte Dempsey*, 1873, L. R. 8 Ch. 676). The prosecution is carried on by the director of public prosecutions (1883, s. 166), and the expenses thereof on production of the order are payable as in felony (1869, s. 17). In the case of those offences, which are misdemeanours (under head C.) in the event of bankruptcy, the Bankruptcy Court may commit the accused for trial without sending him for preliminary inquiry before justices, and may take depositions, bind over witnesses, and take bail, in the same way as a stipendiary magistrate (1883, s. 165). But in practice this power is not exercised, and the director of public prosecutions on receiving an order to prosecute adopts the ordinary procedure of his department as to indictable offences.

It is not quite clear whether the Court may act *proprio motu* in making

the order (1883, s. 165 (1)). Ordinarily it acts on the written report of the trustee in bankruptcy or the official receiver, without notice to the bankrupt (*Ex parte Leonard*, 1875, L. R. 19 Eq. 269; *Ex parte Marsden*, 1876, 2 Ch. D. 786), or on the representation of a creditor on the committee of inspection (1869, s. 16; 1883, s. 164) supported by proper evidence (*Ex parte Leonard*, 1875, L. R. 19 Eq. 269). The bankrupt or other person ordered to be prosecuted with him has no appeal from an order for his prosecution (*Ex parte Marsden*, 1876, 2 Ch. D. 786; *Ex parte Brown*, 1876, 2 Ch. D. 799). But an appeal lies on a refusal to direct a prosecution by the trustee or official receiver (*Ex parte Dempsey*, 1873, L. R. 8 Ch. A. 676; *Ex parte Priestley*, 1878, 10 Ch. D. 774; *In re Stephens*, 1885, 2 Mor. Bky. 20).

Prosecutions not under order of a Bankruptcy Court or the High Court (s. 165 (3)) follow the ordinary course for indictable offences, and are subject to the Vexatious Indictments Act, 1859, but no costs can be given to the prosecutor (*R. v. Thomas*, 1870, 11 Cox C. C. 535). The justices, besides their power to take evidence for the defence under 30 & 31 Vict. c. 35, are also required to hear any evidence tendered to negative "guilty intent" (1869, s. 18; *R. v. Dyson*, [1894] 2 Q. B. 176, 179).

Venue.—The place of trial for these offences is where they are committed; and where credit was obtained, in the place where the creditor gave credit (*R. v. Dawson*, 1888, 16 Cox C. C. 556).

Indictment.—The form of indictment is prescribed by sec. 19 of the Act of 1869. Consequently it is unnecessary to set out in detail details of false pretences or representations (*R. v. Pierce*, 1887, 56 L. J. M. C. 85 (C. C. R.); *R. v. Watkinson*, 1872, 12 Cox C. C. 271 (C. C. R.); and cp. *Taylor v. R.*, [1895] 1 Q. B. 706). Amendment cannot be made after a verdict of a count containing a defect not cured by verdict (*R. v. Oliver*, 1877, 13 Cox C. C. 588 (C. C. R.); *R. v. Knight*, 1878, 14 Cox C. C. 31).

Where the word "fraudulent" does not occur in the definition of the offence, the burden of disproving intent to defraud is on the defence (*R. v. Thomas*, 1871, 11 Cox C. C. 535; *R. v. Bolus*, 1871, 23 L. T. 339).

The provisions of sec. 85 of the Larceny Act, 1861, as amended by sec. 27 of the Bankruptcy Act, 1890, apply only to prosecutions under the factor sections (75–84) of the Larceny Act. Consequently the admissions or statements of a bankrupt in his examination in bankruptcy are evidence against him in respect of the offences within the title, and may be proved either by the notes of examination read over to and signed by the debtor (45 & 46 Vict. c. 52, s. 17), or by oral evidence that they were made (*R. v. Erdheim*, [1896] 2 Q. B. 260). The proceedings of the Court of Bankruptcy, so far as material to the prosecution, are proved under secs. 132, 133, 136, 140 of the Bankruptcy Act, 1883 (see Russell on *Crimes*, 6th ed., vol. iii. p. 445; *R. v. Lowe*, 1883, 52 L. J. M. C. 122).

[*Authorities*.—Archbold, *Cr. Pl.*, 21st ed.; Russell on *Crimes*, 6th ed., vol. ii. p. 411; Williams on *Bankruptcy*, 6th ed.; Robson on *Bankruptcy*, 7th ed., 660; Baldwin on *Bankruptcy*, 7th ed., 417.]

Devise.—See WILL.

Marriage.—See MARRIAGE.

Parliamentary Votes.—As to Fraudulent Conveyances for the purpose of creating, see FAGGOT VOTE.

Pledge.—See PAWN; PLEDGE.

Preferences.—See FRAUDULENT Conveyances, *supra*; BANKRUPTCY, vol. i. at p. 508; and COMPANY, vol. iii. at p. 219.

Prospectus.—See COMPANY, vol. iii. at p. 185.

Purpose.—As to scope of within sec. 96 of 24 & 25 Vict. c. 96, see LARCENY.

Removal of Property.—See BANKRUPTCY, vol. i. at p. 522.

Representation.—See COMPANY, vol. iii. at pp. 185, 186.

Settlement.—See SETTLEMENT.

Transfer.—See FORGED TRANSFER; and Conveyances, *supra*.

Free alongside.—If goods are to be delivered “free alongside a ship or wharf,” they are at the risk of the seller till a due delivery according to the contract has been made (*Percival Smith & Co. v. Lawes Chemical Manure Co.*, 1880, W. N. 50). See ALONGSIDE.

Free-bench.—See HUSBAND AND WIFE.

Free Chapel.—See PARISH CHURCH.

Free Customs.—See WITH ALL LIBERTIES AND FREE CUSTOMS.

Free Fishery.—See FISHERIES.

Free Freight.—See FREIGHT.

Free from Average.—In a slip for an ordinary marine policy the words “on cotton on deck, *f. p. av.* collision, including jettison and washing overboard,” mean that the underwriter is to be liable for any particular average loss, unless the ship is stranded, sunk, burnt (the ordinary memorandum clause in a Lloyds’ policy), or in collision, but is to be liable for such loss if caused by jettison or washing overboard (*British and Foreign M. I. C. v. Sturge*, 1897, 2 Com. Cas. 244).

Free of Expense to Ship.—This provision in a charter-party makes the charterer and not the shipowner liable for the loading and discharging of the cargo; and he must do this either in the time fixed by the contract, or if no time is fixed then in a reasonable time under the existing circumstances, so far as they are not caused or contributed to by any fault on his part (*Wright v. New Zealand Shipping Co.*, 1878, 4 Ch. D. 165; *Hick v. Raymond*, [1893] App. Cas. 27). A provision that “the

cargo is to be brought to and taken from alongside at merchant's risk and expense" is equivalent to the above (*Postlethwaite v. Freeland*, 1880, 5 App. Cas. 599). See CARGO; DEMURRAGE.

A custom in a particular port or trade for a shipowner to put timber which he has brought as a cargo into lighters brought alongside by the assignees, is not inconsistent with a provision in a charter-party that the cargo is to be "taken from alongside at the merchant's expense," and the shipowner is bound to comply with the custom (*Aktieselskab Helix v. Ekman*, [1897] 2 Q. B. 83).

Free on Board.—See F. O. B.

Free School is the common designation of a large class of old endowed schools. The term "free school" must be distinguished from "free grammar school" (*A.-G. v. Jackson*, 1837, 2 Keen, 551), although there are cases where, upon the evidence, it may be held in the particular instance to mean "free grammar school." The term "GRAMMAR SCHOOL" (*q.v.*) refers to the kind of instruction, viz. Greek or Latin; "free school," on the other hand, refers merely to the terms on which the instruction, of whatever kind, is given (*A.-G. v. Bishop of Worcester*, 1851, 9 Hare, 358). In the last-mentioned case it was laid down that in the case of a free school founded in the seventeenth century for "instruction in good literature and learning," the presumption is that instruction in Greek and Latin is intended, *i.e.* that "free school" means "free grammar school." For the general law, see ENDOWED SCHOOLS.

[*Authority.*—Tudor's *Charitable Trusts*, 3rd ed.]

Freedom from Incumbrances.—The covenants for seisin, right to convey, quiet enjoyment, freedom from incumbrances and further assurance constitute in the order mentioned the ordinary covenants for title inserted in a conveyance. The covenant for freedom from incumbrances, following that for quiet enjoyment, is to the effect that such enjoyment shall be free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the vendor, his heirs, executors, or administrators, well and sufficiently, saved harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, etc., estates, rights, titles, charges, and incumbrances whatsoever, had, made, done, executed, or willingly suffered by the vendor, or any person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him. The covenant begins "and *that* free . . .," and the word *that* is a pronoun referring to the quiet enjoyment warranted by the preceding covenant; so that what the vendor covenants is not that the estate granted is free from incumbrances, but that it shall be so enjoyed and possessed; and there must be an actual interference with such enjoyment and possession before the vendor can be sued for breach of his covenant.

As to the words "former and other . . . incumbrances," the insertion of the word "other" is necessary if the purchaser is to be fully protected. For where a covenantant to save harmless from all former bargains, sales, etc., permitted or occasioned by any person except the interest and estate of X., and the estates thereafter to be granted by X. determinable at X's death, and X. afterwards granted certain lands (parcel of the original grant) to be

held for three lives, it was held that the continuance of the grant after the death of X. was not a "former" incumbrance, and therefore not a breach of the covenant, seeing that the incumbrance was made after the covenant (*Lovell v. Lutterell*, Sav. 74; and see also *Hamilton v. Rydear*, 1 Leon. 92, 10 Co. Rep. 42 *a*, both of which cases are set out fully in Platt on *Covenants*, pp. 332, 333).

But now express covenants of this kind are of rare occurrence, conveyancers relying on the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). See CONVEYANCING ACTS.

In a conveyance for valuable consideration by a person who conveys, and is expressed to convey as "beneficial owner," there is deemed to be included, and by virtue of sec. 7 of the Act implied, a full covenant (*inter alia*) for freedom from incumbrances—other than those subject to which the conveyance is expressly made—by the person or by each person who so conveys as far as regards the subject-matter or share of the subject-matter conveyed by him with the person or persons to whom the conveyance is made. And in a mortgage by a person who conveys as beneficial owner a similar covenant for freedom from incumbrances is likewise implied. But in conveyances by every person who conveys, and is expressed to convey as trustee or mortgagee or personal representative or committee of a lunatic not so found by inquisition or under an order of the Court, although a covenant against incumbrances is also implied by virtue of the section, it is of a far more restricted nature than those already noticed; for the covenant is then to be deemed to extend only to each of these persons' own acts. Of course anyone, whether a beneficial owner or not, may, for the purpose of giving by implication this and the other covenants for title, be expressed to convey "as beneficial owner," and this is in practice often done. It should be noticed, too, in connection with the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 124, that the Court may authorise the committee of a lunatic not only to convey property on the lunatic's behalf, but also on the like behalf to enter into covenants for title by such committee being in the conveyance expressed to convey as beneficial owner (see *In re Ray*, [1896] 1 Ch. 468).

Similarly where a person directs as "beneficial owner" that a third party shall convey, the person giving the direction is deemed to convey as "beneficial owner" within the section the subject-matter conveyed by his direction, and a covenant on his part to the like effect is implied accordingly (see Conveyancing Act, 1881, s. 7, F (2)). A conveyance under this section includes a deed (but not a demise by way of lease at a rent or any other customary assurance) conferring the right to admittance to copyhold or customary land. The covenant for freedom from incumbrances implied by the section is therein set out at length, and may be referred to for the form of such covenants. A precedent will also be found in Wms. *Real Property*, Appendix D.

The covenant runs with the land, and as to the benefit of the covenants implied by the Conveyancing Act, it is by subsec. (6) of sec. 7 enacted that it shall be incident to the estate and interest of the implied covenantee, and shall be enforceable by every person in whom that estate or interest is for the whole or any part thereof from time to time vested. See generally as to the benefit of these covenants, *David v. Sabin*, [1893] 1 Ch. 523.

By virtue also of certain other statutes, of which the Lands Clauses Consolidation Act, 1845, is the most important, a covenant (*inter alia*) against incumbrances by the promoters of an undertaking is implied by the use of the word *grant* by the conveying party in the conveyance. As

to this and also the old law on the implied covenant for title created by the use of that word, see GRANT, and Hargrave and Butler's note to *Co. Litt.* s. 384 a.

The expenses of paving a new street apportioned under sec. 77 of the Metropolis Management Act, 1862, are not a charge upon the property in respect of which they are payable: they are but successive personal liabilities imposed on successive owners. Accordingly a vendor is not bound to discharge such expenses by virtue of the covenant against incumbrances implied by his conveying as "beneficial owner" (*Egg v. Blaney*, 1888, 21 Q. B. D. 107). It would be otherwise were expenses, as, e.g., under the Public Health Act, 1875 (38 & 39 Vict. c. 55), expressly made a charge upon the lands by statute (*Bettesworth and Richer's Contract*, 1888, 37 Ch. D. 535).

In spite of the provisions of the Conveyancing Act already noticed for implying a covenant for freedom from incumbrances, such circumstances may occur as to make it sometimes necessary to insert an express covenant, as, e.g., where lands are situate abroad.

Freedom of a Borough.—Before the passing of the Municipal Corporations Act, 1835, each borough had its own peculiar customs and by-laws as to the admission of freemen. Such customs and by-laws were, however, controlled by the charter of the borough, to this extent, that any usage which was "repugnant to" or inconsistent with the positive provisions of the charter was void (*R. v. Salway*, 1829, 9 Barn. & Cress. at p. 435), even though it had prevailed for more than two hundred years (the case of *Helleston*, 1776, 2 Doug. Elect. 3). Existing usages were respected when the Act of 1835 was passed. Every person who was then an admitted freeman remained a freeman, and retained all his former rights and privileges after that Act had passed (5 & 6 Will. IV. c. 76, s. 2). And now, every person who, if that Act had not passed, might have been admitted otherwise than by gift or purchase, and every person who for the time being is—

- (a) an inhabitant of the borough; or
- (b) the wife, widow, son, or daughter of a freeman; or
- (c) the husband of a daughter, or of the widow, of a freeman; or
- (d) is by deed bound an apprentice to a freeman, and has served as

such apprentice for the whole time for which he was so bound, is entitled to be admitted a freeman, and when so admitted to vote at any parliamentary election of the borough (45 & 46 Vict. c. 50, s. 209), to be discharged or exempted from tolls and dues levied for the use of the borough (s. 208), and to acquire the same share and enjoy the same benefit of the hereditaments, common lands, and public stock of the borough, and of any property held for any charitable uses or trusts, in the same manner and to the same extent as if neither the Municipal Corporations Act, 1835, nor that of 1882, had been passed. The town clerk keeps a list, which is called "the freemen's roll," and when any person claims to be admitted a freeman in respect of birth, servitude, or marriage, the mayor examines into the claim; if it is established, the claimant is admitted, and his name enrolled by the town clerk (ss. 203, 204). The freemen's roll is open to public inspection, and the town clerk must deliver copies of it to any person on payment of a reasonable price for each copy (s. 233 (6)).

But no person now can be admitted a freeman by gift or by purchase (s. 202). To this rule there is, however, one exception. Under the

Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29), the council of every borough may from time to time, by the authority of not less than two-thirds of their number present and voting at a meeting of the council, specially called for the purpose with notice of the object, admit to be honorary freemen of the borough persons of distinction and any persons who have rendered eminent services to the borough; provided that the admission of such persons to be freemen shall not confer on them the right of voting for the borough in parliamentary or other elections, or of sharing in the benefit of any hereditaments, common lands, or public stock belonging to the borough or its council, or of any property held in whole or in part for any charitable use or trust.

For Freedom of the City of London, see **LONDON (CITY)**.

Freedom of the Sea.—The sea outside the limit of territorial waters is free to all, and any restriction of its use or the capture of its produce imposed by a State upon its citizens is binding upon them only. Thus the Hague Convention of 6th May 1882 for the regulation of high sea fishing in the North Sea is only binding as among the parties to it. Several other conventions similarly restricting the freedom of the sea have been entered into (see **BEHRING SEA FISHERIES CASE**; **CABLES, SUBMARINE**; **NORTH SEA CONVENTION**; **TERRITORIAL WATERS**. See also **PIRATE**; **VISIT AND SEARCH**).

The last vestige of the old controversy as to freedom of the sea and of claims to exclusive sovereignty over large areas of the ocean, or to distances from land beyond effective control, was that recently raised by the United States to Behring Sea (see **BEHRING SEA FISHERIES CASE**). Hautefeuille gives an exhaustive examination of principles in his *Histoire des origines, progrès et variations du Droit Maritime International*, 2nd ed., Paris, 1869, pp. 13 *et seq.*

Freehold.—See **ESTATES**; **ESTATES OF INHERITANCE**. As to what will pass under a devise of "freeholds," see **WILLS**.

Freehold Land Societies.—See **LAND SOCIETIES**.

Freeman.—See **LONDON (CITY)**, *Freedom of*; **FREEDOM OF BOROUGH**.

Freemason.—The lodges of freemasons are referred to in the Unlawful Societies Act, 1799 (see **SOCIETIES, UNLAWFUL**) (39 Geo. III. c. 79), as certain societies which have been long accustomed to be holden in this kingdom, the meetings whereof have been in great measure directed to charitable purposes. Such meetings are exempted from the operation of the Act (s. 5), but they are to be registered (ss. 6, 7). They are also, if duly so registered, exempted from the operation of the "Act for more effectually preventing seditious meetings" (57 Geo. III. c. 19, s. 26).

Supplemental Notes.

